101 - 27051

STANDARD BASKET COMPANY,
a corporation,

Plaintiff in Error,

v.

ANTON DEMBSKI, BOLESLAW DEMBSKI, WITOLD DEMBSKI and JOSEPH WITKOWSKI,

Defendants in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

227 I.A. 593

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant, Standard Basket Company, filed a bill in equity seeking to enjoin the breach of certain contracts whereby it was claimed the defendants agreed not to engage in the manufacture of baskets. Defendants interposed general and special demurrers to the bill, which demurrers were sustained. Complainant elected to stand by its bill, whereupon, a decree was entered dismissing the bill for want of equity, to reverse which the complainant had sued out this writ of error.

By its bill the complainant set forth the following facts. The three Dembski brothers were engaged in the business of manufacturing baskets in the City of Chicago, under the name and style of American Basket Company; they entered into negotiations with the complainant which resulted in the sale of their business to the complainant for a consideration of $14,000.00. To complete and accomplish that sale, the Dembski brothers executed and delivered to the complainant a memorandum in writing acknowledging the receipt of $1,000.00 as earnest

101 - 27031

STANDARD MARKET COMPANY, a corporation,	
plaintiff in error,	
v.	MEMOR TO
AUTOS DEMOSKI, MICHALLY DEMOSKI, SIROIS DEMOSKI and JOSEPH SIMOVSKI,	SUPREME COURT, COOK COUNTY.
Defendants in error.	

MR. PRESIDING JUSTICE DUNN delivered the opinion of the court.

The complainant, Standard Market Company, filed a bill in equity seeking to enjoin the breach of a train conspiracy whereby it was claimed the defendants agreed not to engage in the manufacture of markets. Defendants interposed general and special demurrers to the bill, which demurrers were sustained. Complainant elected to stand by its bill, whereupon, a decree was entered dismissing the bill for want of equity, to reverse which the complainant has sued out this writ of error.

By its bill the complainant set forth the following facts. The three Demski brothers were engaged in the business of manufacturing markets in the city of Chicago, under the name and style of American Market Company; they entered into negotiations with the complainant which resulted in the sale of their business to the complainant for a consideration of $14,000.00. To complete and accomplish that sale, the Demski brothers executed and delivered to the complainant a warranty in writing acknowledging the receipt of $1,000.00 as earnest

money, and stating that $4,000.00 was to be paid on July 15, 1919, and the balance of $9,000.00 was to be secured by a chattel mortgage, payable $1,500.00 each month; and in this memorandum, copy of which was attached to the bill, the Dembski brothers agreed that they would "not start in any basket business." This memorandum of agreement was executed under date of July 10, 1919. The $4,000.00 was paid as agreed by the complainant. The Demski brothers executed a bill of sale of their business to the complainant and subsequently the balance of the payments from the complainant to the Demski brothers were made as called for in the memorandum of agreement. Thereafter, on December 16, 1920, Anton Dembski and Boleslaw Dembski entered into a contract in writing, with the complainant, wherein it was stipulated that the prior agreement be so modified as to permit Anton Dembski and Boleslaw Dembski to manufacture baskets for the complainant. The provisions of this latter contract are hereinafter referred to more specifically. The bill referred particularly to the several negative covenants contained in this contract on the part of Anton and Boleslaw Dembski, to the effect that they would not compete with the complainant in the business of manufacturing baskets, nor interfere with its business, nor sell any of the baskets they manufactured to any person, firm, or corporation other than the complainant, and that they would refrain from doing any act which might be injurious to the established basket manufacturing business of the complainant.

The bill further set forth that under the terms of the contract of December 16, 1920, Anton and Boleslaw Dembski agreed to manufacture and sell to the complainant such number of baskets as it might require, from time to time, at certain specified prices; and it also alleged that complainant had performed its part of this contract in every respect but that Anton and

money, and stating that $4,000.00 was to be paid on July 15, 1919, and the balance of $9,000.00 was to be secured by a chattel mortgage, payable $1,800.00 each month; and in this memorandum, copy of which was attached to the bill, the Bambki brothers agreed that they would "not start in any market business." This memorandum of agreement was executed under date of July 10, 1919. The $4,000.00 was paid as agreed by the complainant. The Lemski brothers executed a bill of sale of their business to the complainant and subsequently the balance of the payments from the complainant to the Lemski brothers were made as called for in the memorandum of agreement. Thereafter, on December 16, 1920, Anton Bambki and Belaslaw Bambki entered into a contract in writing, with the complainant, wherein it was stipulated that the prior agreement be so modified as to permit Anton Bambki and Belaslaw Bambki to manufacture baskets for the complainant. The provisions of this latter contract are hereinafter referred to more specifically. The bill referred particularly to the several negative covenants contained in this contract on the part of Anton and Belaslaw Bambki, to the effect that they would not compete with the complainant in the business of manufacturing baskets, nor interfere with its business, nor sell any of the baskets they manufactured to any person, firm, or corporation other than the complainant, and that they would refrain from doing any act which might be injurious to the established basket manufacturing business of the complainant.

The bill further set forth that under the terms of the contract of December 16, 1920, Anton and Belaslaw Bambki agreed to manufacture and sell to the complainant such number of baskets as it might require, from time to time, at certain specified prices; and it also alleges that complainant had performed its part of this contract in every respect but that Anton and

Boleslaw Dembski had failed to perform their part of the contract. According to the allegations in the bill it appears that Anton and Boleslaw Dembski, subsequent to the contract of December 16, 1920, established a plant for the manufacture of baskets to be sold to the complainant and that the complainant placed orders for baskets with them up to about March 1921, which orders were filled, but that on or about that time the complainant placed an order for a certain lot of baskets under the contract and this order was refused, the Dembskis giving as their reason for this refusal, the fact that the business was then owned by other parties, who were conducting the business under the name of Atlas Basket Company, and that the business not being under their control they were not in a position to fill the order.

The bill then alleges that on or about March 4, 1921, Anton and Boleslaw Dembski made an assignment of either the whole or part of their interest in the business they were carrying on, to the other two defendants, Witold Dembski and Joseph Witkowski, and further, that this assignment was not made in good faith, but rather for the purpose of evading the obligations which Anton and Boleslaw Dembski had had under their contract with the complainant, dated December 16, 1920, and that Witold Dembski and Joseph Witkowski had full knowledge of that contract and its terms at the time of this assignment to them from Anton and Boleslaw Dembski.

The bill further alleges that the four defendants, doing business as the Atlas Basket Company, are now openly violating the covenants of the contract of December 16, 1920, not to compete or interfere with the complainant in its business and that said defendants, since March 1, 1920, have been soliciting orders from complainant's customers in the City of Chicago and surrounding territory and that they will continue to do so unless

Bolsalem Gambell and failed to perform small part of the contract. According to the allegations, the bill of complaint that Anton and Bolsalem Gambell, subsequent to the contract of December 16, 1944, established a plant for the manufacture of baskets to be sold to the complainant and that the complainant placed orders for baskets with them up to August 1947, which orders were filled, but that on or about June 1947 the complainant placed an order for a certain lot of baskets under the contract and this order was refused, the defendants giving as their reason for this refusal, the fact that the business was then owned by other parties, who were conducting the business under the name of Atlas Basket Company, and that the baskets had been under their control they were not in a position to fill the order.

The bill then alleges that on or about March 4, 1947, Anton and Bolsalem Gambell made an assignment of their entire interest in the business to the Atlas Basket Company, and that the defendants were under their control at the time of their last case in the District Court, and, in the other two documents, which could not [illegible] Williamson, and further, that this assignment was made in good faith, but reason for the purpose of avoiding the obligations which Anton and Bolsalem Gambell were under their contract with the complainant, dated December 16, 1944, and that Bolsalem Gambell and Joseph Kiborowski had full knowledge of this assignment and the terms of the bill of indemnity and to them from Anton and Bolsalem Gambell.

The bill further alleges that the defendants, doing business as the Atlas Basket Company, are now openly violating the covenants of the contract of December 16, 1944, not to compete or interfere with the complainant in the business and that said defendants, since March 1, 1947, have been soliciting orders from complainant's customers in the City of Lodi to whom corresponding particulars are that they will continue to do so unless

restrained by injunction; and that by reason of this interference with its business, by the defendants, the complainant has sustained loss of profits and injury and damage to its business, and that the action of the defendants, if continued, will result in future irreparable damage and injury to the complainant.

It is then alleged in the bill that on, to wit, the 10th day of July, 1919, (the date of the first contract) and thereafter, the reasonable limits of the established trade and good-will of the basket business, formerly owned by the Dembski brothers and purchased by the complainant, extended over the City of Chicago, and its surrounding territory to the extent of fifty miles, and that since March 1, 1921, the defendants, doing business as the Atlas Basket Company, had made divers sales of baskets manufactured by them, to different persons, firms and corporations within the City of Chicago, and the surrounding territory, and that they will continue to do so unless enjoined, and it is further alleged that the complainant has no adequate remedy at law and that unless the defendants are enjoined, the complainant will suffer irreparable loss and injury.

The bill concludes with the prayer that the defendants be restrained and enjoined from violating the negative covenants of the contract of December 16, 1920, and particularly, that they be restrained from competing with the complainant and injuring its established basket manufacturing business, within the City of Chicago and its surrounding territory to the extent of fifty miles while the complainant, its successors and assigns shall carry on said business.

Under the contract of July 10, 1919, the three Dembski

restrained by injunction; and that by reason of this interference with its business, by the defendants, the complainant has sustained loss of profits and injury and damage to its business, and that the action of the defendants, if continued, will result in future irreparable damage and injury to the complainant.

It is then alleged in the bill that on, to wit, the 10th day of July, 1910, (the date of the first contract) and thereafter, the reasonable limits of the established trade and good-will of the market business, formerly owned by the complainant premises and purchased by the complainant, extended over the city of Chicago, and the surrounding territory to the extent of fifty miles, and that since October 1, 1911, the defendants, doing business as the Atlas Beater Company, had made diverse sales of beaters manufactured by them, to different persons, firms and corporations within the city of Chicago, and the surrounding territory, and that they will continue to do so unless enjoined, and it is further alleged that the complainant has no adequate remedy at law and that unless the defendants are enjoined, the complainant will suffer irreparable loss and injury.

The bill concludes with the prayer that the defendants be restrained and enjoined from violating the negative covenants of the contract of December 10, 1912, and particularly, that they be restrained from competing with the complainant and injuring its established beater manufacturing business, within the city of Chicago and its surrounding territory to the extent of fifty miles while the complainant, its successors and assigns shall carry on said business.

Under the contract of July 10, 1910, the three defendant

brothers agreed with complainant, that they would not enter into any basket business. In effect the agreement was without limit either as to time or place.

Parties may make a valid agreement in restraint of trade where the operation of the agreement is partial and limited under reasonable conditions and where it is supported by a valuable consideration. For example, where one sells out a business to another for a given consideration and agrees not to re-enter such business thereafter within a reasonable limit of territory, the agreement is valid, and if the vender breaches the agreement and re-enters the business within the territory, to the damage of the other, equity will restrain him. Southern Fire Brick and Clay Co. v. The Garden City Sand Co., 223 Ill. 616. But an agreement in general restraint of trade is against public policy and void. The courts will not enforce any contract which excludes a party, generally, from following any lawful trade or business beneficial to the community and to him. Lanzit v. Sefton Manufacturing Co., 184 Ill. 326; Union Strawboard Co. v. Bonfield, 193 Ill. 420; Tarr v. Stearman, 264 Ill. 110. Therefore, the contract of July 10, 1919, was void.

The contract of December 16, 1920, recited that whereas the complainant under the contract of July 10, 1919, had purchased the basket business of the Dembski brothers for a valuable consideration, which purchase the complainant had made upon the express understanding and condition that the Dembski brothers "would not enter into competition" with the complainant during the time it or its successors or assigns should "carry on the said business of manufacturing baskets within the locality of the established trade and good-will of the said business," and whereas the parties desired to enter into a con-

brothers agreed with complainant, that they won't not enter into any basket business. In effect the agreement was without limit either as to time or place.

Parties may make a valid agreement in restraint of trade where the operation of the agreement is partial and limited under reasonable conditions and where it is supported by a valuable consideration. For example, where one sells out a business to another for a given consideration and agrees not to re-enter such business thereafter within a reasonable limit of territory, the agreement is valid, and if the vendor breaches the agreement and re-enters the business within the territory, to the damage of the other, equity will restrain him. Chapman Bite Brick and Tile Co. v. The Graham City Brick Co., 283 Ill. 616. But an agreement in general restraint of trade is against public policy and void. The courts will not enforce any contract which excludes a party, generally, from following any lawful trade or business beneficial to the community and to him. Lamb v. Crafts Manufacturing Co., 186 Ill. 386; Union Stockyard Co. v. Woolfolk, 193 Ill. 434; Tyler v. Ritzinger, 244 Ill. 110. Therefore, the contract of July 10, 1919, was void.

The contract of December 15, 1922, provided that whereas the complainant under the contract of July 10, 1919, had purchased the basket business of the defendant brothers for a valuable consideration, which recites the complainant had made upon the express understanding and condition that the defendant brothers "would not enter into competition" with the complainant during the time it or its successors or assigns should "carry on the said business of manufacturing baskets within the locality of the established trade and good-will of the said business," and whereas the parties desired to enter into a con-

tract" by which said agreement of July 10, 1919, may be modified so as to permit the parties of the second part (the Dembskis) to manufacture baskets for the party of the first part (the complainant) within the said territory", therefore, "the said contract of July 10, 1919, is hereby modified so as to permit the parties of the second part to manufacture baskets for the party of the first part only, within the time and territory aforesaid, provided, however, that with this single exception the said agreement of July 10, 1919 * * * shall be carried out in accordance with the express and implied conditions thereof, which are hereby ratified and confirmed"and the parties of the second part proceeded to agree with the complainant to carry out the former agreement "in this respect, that from and after the date hereof, they will desist and refrain from entering into competition with the party of the first part, in the business of manufacturing baskets, during the time in which the party of the first part, its successors or assigns, shall carry on said business, or within the territory where said business has been established, to wit, the City of Chicago, and its surrounding territory to the extent of fifty miles." By this second agreement the parties of the second part agreed that while manufacturing baskets for complainant it would not sell to anyone else or interfere with complainant's business in any way. Further, by this agreement, the complainant agreed to buy its requirements from the parties of the second part and the latter parties agreed to furnish such requirements at specified prices. It is to be noted that the contract of July 10, 1919, had been executed by the three Dembski brothers, Anton, Boleslaw, and Witold, as parties of the second part, whereas only Anton and Boleslaw were parties of the second part in the contract of December 16, 1920. The latter contract could have

tract" by which said agreement of July 1, 1919, may be modified so as to permit the partition of the second part (the Company) to manufacture bombs for the army of the first part (the Government) within the said territory", therefore, "the said contract of July 1, 1919, is hereby modified so as to permit the partition of the second part to manufacture bombs for the army of the first part only, within the said territory aforesaid, provided, however, that this single exception and the said agreement of July 1, 1919 - - - shall be carried out in accordance with the purposes and intent and conditions thereof, which are hereby reaffirmed and confirmed, and neither of the contracting parties proceeding or joining with the complainant in carrying out the former agreement in this single respect, but first and after the said period, from all dealer and traffic from carrying into competition with the party of the first part, in the manufacture of munitions bombs, during the time it would the party of the first part, its successors or assigns, shall carry on said business, or within the territory where said business has been established, to wit, the city of Chicago, and its adjacent territory in the county of Cook, Illinois." By this second agreement the portion of the second part in and that which manufacturing bombs in the complainant is said not only to surrender the of business with complainant's business in any way." Further, by this agreement, the complainant agreed to buy the remaining six the million of the second part and the latter further agreed to furnish such machinery as specified prices. It is to be noted that the contract of July 1, 1919, had been assigned by the three parties, namely, Anson, Molaine, and Vivian, as partner of the second part, whereas only Anson and Molaine were parties of the second part in the contract of December 16, 1920. The latter contract could have

no effect upon the former one as it was not between the same parties.

There have, therefore, never been any valid contractual relations between the complainant and Witold Dembski and no direct contractual relations of any kind between the complainant and Joseph Witkowski.

While the complainant may have acquired certain contractual rights as against Anton and Boleslaw Dembski, as a result of the contract of December 16, 1920, in our opinion it is not shown by the facts alleged in the bill to have any rights as against Witold Dembski or Witkowski such as would be necessary to support the bill so far as it relates to these two defendants.

Furthermore, the complainant's bill shows that it is based, at least in part, on the refusal of Anton and Boleslaw Dembski and their assigns, Witold Dembski and Edward Witkowski, to sell the baskets of their manufacture to the complainant as agreed to in the contract of December 16, 1920, and by injunction restraining defendants from failing to observe the negative covenants of the contract, complainant seeks to accomplish a specific performance of its positive covenants. A bill will not lie in equity which is in effect for specific performance of a contract calling for a continuing performance through a long period of time. Grape Creek Coal Co. v. Spellman, 39 Ill. App. 630; Harley v. Sanitary District of Chicago, 54 Ill. App. 337; Lee v. Chicago League Ball Club, 169 Ill. App. 525.

If we assume that there is a valid contractual obligation on Anton and Boleslaw Dembski, and through them, on their assigns, Witold Dembski and Joseph Witkowski, to furnish the complainant, its requirements in baskets, as the complainant

no effect upon the former one as it was not between the same parties.

There have, therefore, never been any valid contractual relations between the complainant and Field Dempsey and no direct contractual relations of any kind between the complainant and Joseph Wikowski.

While the complainant may have acquired certain contractual rights as against Anton and Bolesław Dembski, as a result of the contract of December 16, 1936, in our opinion it is not shown by the facts alleged in the bill to have any rights as against Field Dempsey or Wikowski such as would be necessary to support the bill so far as it relates to these defendants.

Furthermore, the complainant's bill shows that it is based, at least in part, on the refusal of Anton and Bolesław Dembski and their assigns, Field Dempsey and Joseph Wikowski to sell the benefits of their contracts to the complainant as agreed to in the contract of December 16, 1936, and by injunction restraining defendants from failing to observe the negative covenants of the contract, complainant seeks to accomplish a specific performance of its affirative covenants. A bill will not lie in equity which is in effect for specific performance of a contract calling for a continuing performance through a long period of time. Grace Church Cont. Co. v. Hoffman, 39 Ill. App. 630; Bailey v. Chamber of Commerce, 86 Ill. App. 487; Lee v. Mutual Benefit Life Ins. Co., 223 Ill. App. 228.

If we assume that there is a valid contractual obligation on Anton and Bolesław Dembski, and through them, on their assigns, Field Dempsey and Joseph Wikowski, to furnish the complainant, its requirements in beets, as the complainant

contends, it is apparent that complainant has an adequate remedy at law if they fail to do so.

In our opinion the demurrers interposed by the defendants to the bill of complaint were properly sustained, and, therefore, the decree of the Superior Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

contends, it is important that complainant has an adequate remedy at law if they feel is so so.

In our opinion the damages incurred by the defendants in the sill of complaint were properly measured, and, therefore, the decree of the superior Court is affirmed.

AFFIRMED.

TAYLOR AND LAMBECK, JJ., CONCUR.

125 - 27075

(2637a)

KASTANTOS REKSNIS,

Appellee,

v.

MOTOR CAR INDEMNITY EXCHANGE, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 593

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Reksnis, brought this action in the Municipal Court of Chicago, against the defendant Motor Car Indemnity Exchange, to recover an amount alleged to be due on a policy of automobile theft insurance, which had been issued by the defendant to the plaintiff. The case was tried before the court and a jury. The plaintiff's right of action was based on an alleged agreement of settlement, whereby the plaintiff claimed that the defendant had agreed to pay him the sum of $800.00, and that it later refused to carry out that agreement. The affidavit of merits denied that any such agreement had been made. The jury found the issues for the plaintiff and assessed his damages at the sum stated above, and judgment was entered against the defendant for that amount, to reverse which, the defendant has perfected this appeal.

It is the plaintiff's contention that the agreement of settlement was made on behalf of the defendant by one, Brown, and the chief question in controversy between the parties, relates to the extent of Brown's authority. That he had no express authority to settle claims generally, or this claim in particular, seems clear from the record, but it is the

125 - 27075

KARZAWICZ MEMORIAL, Appellee, v. MOTOR CAR INDEMNITY EXCHANGE, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Mr. PRESIDING JUSTICE TRUMBULL delivered the opinion of the court.

The plaintiff, Karzawicz, brought this action in the Municipal Court of Chicago, against the defendant Motor Car Indemnity Exchange, to recover an amount alleged to be due on a policy of automobile theft insurance, which had been issued by the defendant to the plaintiff. The case was tried before the court and a jury. The plaintiff's right of action was based on an alleged agreement of settlement, whereby the plaintiff claims that the defendant had agreed to pay him the sum of $850.00, and that it later refused to carry out that agreement. The affidavit of merits denies that any such agreement had been made. The jury found the issues for the plaintiff and assessed his damages at the sum stated above, and judgment was entered against the defendant for that amount, to reverse which, the defendant has certiorated this appeal.

It is the plaintiff's contention that the agreement of settlement was made on behalf of the defendant by one, Brown, and the chief question in controversy between the parties, relates to the extent of Brown's authority. That he was no express authority to settle claims generally, or this claim in particular, seems clear from the record, but it is the

plaintiff's position that his implied authority was such as to bind the defendant in this settlement.

The chief witness for the plaintiff was one of the members of a firm of lawyers who were the plaintiff's attorneys of record. This lawyer represented the plaintiff in his negotiations for a settlement and prepared all the papers incident to the filing of this law suit, but, he apparently did not actively conduct the case before the court and jury. His testimony related to what had taken place in the various conferences between himself, his client and Brown.

The witness referred to testified that he had known Brown for a number of years; that Brown had an office in the suit occupied by the defendant; that he talked with Brown over the telephone, about his client's claim, and later went over to see him; that he asked Brown who would take the matter up for settlement and Brown told him he was the adjuster and he would do so. He testified further that he told Brown he thought his client ought to have $1,500.00, - the amount on which his client had been paying premiums; that Brown called his attention to the fact that under the policy, the defendant was liable only for the fair value of the car at the time it was stolen; that he told Brown that he thought the fair value of the car, in the condition it was when it was stolen, was $1,000.00; that Brown said about $800.00 was right, in his judgment; that his client, who was present, said that he would settle his claim for $800.00, and Brown said that he would pay $800.00, but asked them to wait a few days, explaining that the defendant did not have sufficient money on hand at the time to pay the claim and they did not want to sell any of the securities they had in their possession. He further testified that he made

plaintiff's position that his implied authority was such as to bind the defendant in this settlement.

The chief witness for the plaintiff was one of the members of a firm of lawyers who were the plaintiff's attorneys at Moncton. This lawyer represented the plaintiff in his negotiations for a settlement and prepared all the papers in evidence in the filing of this law suit, but, he apparently did not actively conduct the case before the court and jury. His testimony related to what had taken place in the various conferences between himself, his client and Brown.

The witness referred to testifying that he had known Brown for a number of years; that Brown had an office in the suit occupied by the defendant; that he talked with Brown over the telephone, about his client's claim, and later went over to see him; that he asked Brown who would take the matter up for settlement and Brown told him he was the adjuster and he would do so. He testified further that he told Brown he thought his client might be here $1,500.00, - the amount on which his client had been paying premium; that Brown called his attention to the fact that under the policy, his defendant was liable only for the fair value of the car at the time it was stolen; that he told Brown that he then put the fair value of the car, in the condition it was when it was stolen, was $1,700.00; that Brown said about $400.00 was right, in his judgment; that his client, who was present, said that he would settle his claim for $800.00, and Brown said that he would pay $800.00, but asked them to wait a few days, explaining that the defendant did not have sufficient money on hand at the time to pay the claim and they did not want to sell any of the securities they had in their possession. He further testified that he made

several subsequent visits to Brown's office, in an effort to collect the money, but without success, Brown explaining, on one occasion, that the defendant's manager, Mr. Rice, was out of the City and had not left any checks which could be used in the settlement of claims; that on another visit Brown told him Rice was not in, but the witness had seen Rice in his office and so told Brown, whereupon, the latter went in to Rice's private office and later came out and told him, the witness, to go in and talk with Mr. Rice. He further testified that he did go in and talk with Rice in the presence of another man, apparently connected with the company, and that Rice said he would not pay $800.00 but that he would pay $600.00. This was not satisfactory and this action was instituted. At one point in his testimony the witness was permitted, over the objection of defendant, to relate that on the occasion of one of his visits to Brown's private office, a man came in who had a claim against the defendant for an automobile tire that had been stolen from his car; that Brown asked the man what the tire was worth and the man told Brown what it would cost to get a new one; that Brown told him he could get the tire cheaper than that, and he referred him to a place and instructed him to go there and buy the tire, explaining that the bill for the tire could be sent to the defendant and that thelatter would pay it. This testimony was apparently introduced on the theory that it tended to show that Brown had authority to adjust and settle losses. In our opinion the testimony was not incompetent.

Brown testified that he was an attorney and that he was doing some work for the defendant "and practicing law besides". On the question of the settlement of the plaintiff's

several subsequent visits to Brown's office, in an effort to collect the money, but without success. Brown explaining, on one occasion, that the defendant's manager, Mr. Rice, was out of the city and had not left any checks which could be used in the settlement of claims; that on another visit Brown told Mr. Rice was not in, but the witness was pass Rice in his office and so told Brown, whereupon, the latter went in to Rice's private office and later came out and said Rice, the witness to go in and talk with Mr. Rice. He further testified that he did go in and talk with Rice in the presence of another man, apparently connected with the company, and that Rice said he would not pay $800.00 but that he would pay $400.00. This was not satisfactory and suit action was instituted. At one point in his testimony the witness was permitted, over the objection of defendant, to relate that on the occasion of one of his visits to Brown's private office, a man came in who had a claim against the defendant for an automobile that had been stolen from him; that Brown asked the man what the life was worth and the man told Brown what it was worth; that Brown told him he could get the life cheaper than that, and he did, and Brown told him to go place and testify to the life as it be and be the life, explaining that the bill for the life was to be sent to the defendant and that Bailey would pay it. This testimony was apparently introduced on the theory that it tended to show that Brown was a notorious to uttering false bills. In our opinion the testimony was not incompetent.

Brown testified that he was an attorney and that he was doing some work for the defendant and practicing in Bedford. On the question of the settlement of the plaintiff's

claim with the lawyer representing him, he testified that he discussed with the lawyer certain circumstances surrounding the alleged theft of the plaintiff's car, and that he told the lawyer he thought, under those circumstances, Mr. Rice "would not pass a settlement on the case." He further testified that he told the lawyer that Rice passed on all settlements; that on the occasion of the lawyer's last visit to the defendant, he introduced the lawyer to Mr. Rice in the latter's office, and then left the room. On cross-examination he testified that he talked with claimants to find out what they wanted, and then submitted their propositions to Rice and that he had no official capacity with the defendant; that, if anything, his status was that of claims attorney and that his name was on the door as attorney.

Rice testified as to his talk with the lawyer for the plaintiff and said that he called attention to certain statements by the plaintiff in his application for insurance, and told the lawyer that the defendant would not pay anything on the loss. As to the status of Brown with the defendant, Rice testified that he was an investigator,- "he handles our loss work, investigating in connection with losses * * * He was looking after claim matters, which means losses"; that under the practice of the defendant, when a loss report came to their office, a file was made which was referred to an investigator and that during the progress of the investigation it was referred to him from time to time, and when it reached the point of disposition, it was brought to him for his final approval, and he initialed the file and dated it and put down the amount which was to be paid on the claim; that Brown never, to his knowledge, approved, passed on, accepted or solicited an offer for settlement of a claim, without his approval.

claim with the lawyer representing him, he insisted that he discussed with the lawyer certain circumstances surrounding the alleged theft of the plaintiff's car, and that he told the lawyer he thought, under these circumstances, Mr. Hise "would not pass a settlement on the case." He further testified that he told the lawyer that nine passed on all settlements; that in the opinion of the lawyer's last visit to the defendant, he introduced the lawyer to Mr. Hise in the latter's office, and then left the room. In cross-examination he testified that he talked with plaintiff to find out what they wanted, and then submitted their propositions to Hise and that he had no official capacity with the defendant; that, if anything, his status was that of plaintiff's attorney. Mr. Hise's name was on the door as attorney.

Also testifying as to his talk with the lawyer for the plaintiff, one said that he called attention to certain statements by the plaintiff in his application for insurance, and told the lawyer that the company would not be anything on the item. As to the status of Crown with the defendant, Hise testified that he was an investigator. "He handles our loss work, investigating in connection with losses * * * He was looking after claim matters, which means losses"; that under the provisions of the contract, when a loss report came to their office, a file was made which was let read to an investigator and that during the progress of the investigation it was referred to him from time to time, and when it reached the point of disposition, it was brought to him for final approval, and he initiated the file and called it up out down the amount which was to be paid on the claim; that Crown never, to his knowledge, approved, passed on, compromised or solicited an offer for settlement of a claim, without his approval.

One Wiweke, testified that he was connected with the defendant as secretary and that he was the man who was in the office of Mr. Rice on the occasion of the latter's conversation with the plaintiff's attorney, and he corroborated Rice as to that conversation. In rebuttal, plaintiff's attorney testified that Wiweke was not the man he saw in Rice's office, "unless I am badly mistaken."

In our opinion the evidence in the record was not sufficient to establish the authority of Brown to bind the defendant on a settlement of the plaintiff's claim, and we are further of the opinion that the verdict is against the manifest weight of the evidence. At most, it would seem from the record, that he was representing the defendant as its attorney who was employed to investigate claims and submit the facts to others who would adjust or settle the claims.

The general rule is that an attorney has no right, by virtue of his general employment, to compromise or settle his client's cause of action. Wadhams v. Gay, 73 Ill. 415. An assured who negotiates with one acting as attorney for the insurer, is bound to take notice of the limited authority of such attorney and, in our opinion, one acting as attorney for the insurer, has not, by virtue of that relation, an implied authority to bind the insurer to pay a given amount in settlement of a loss claimed by an assured. The same would be true with one acting on behalf of the insurer, merely as an investigator. The contrary would be true where one was acting on behalf of an insurer as an adjuster, and was so held out by the insurer. The Millers' Natl. Ins. Co. v. Kinneard, 136 Ill. 199.

One Hawke, testified that he was connected with the defendant as secretary and that he was the man who was in the office of Mr. Rice on the occasion of the latter's conversation with the plaintiff's attorney, and he corroborated Rice as to that conversation. In rebuttal, plaintiff's attorney testified that Hawke was not the man he saw in Rice's office, "unless I am badly mistaken."

In our opinion the evidence in the record was not sufficient to establish the authority of Rice to bind the defendant on a settlement of the plaintiff's claim, and we are further of the opinion that the verdict is against the manifest weight of the evidence. At most, it would seem from the record, that he was representing the defendant as its attorney who was employed to investigate claims and submit the facts to adjuster who would adjust or settle the claims.

The general rule is that an attorney has no right, by virtue of his general employment, to compromise or settle his client's cause of action. Hawkins v. Day, 73 Ill. 413. An assured who negotiates with one acting as attorney for the insurer, is bound to take notice of the limited authority of such attorney and, in our opinion, one acting as attorney for the insurer, has not, by virtue of that relation, an implied authority to bind the insurer to pay a given amount in settlement of a loss claimed by an assured. The case would be true with one acting on behalf of the insurer, notwithstanding an interest. The contrary would be true where one was acting on behalf of an insurer as an adjuster, and was so held out by the insurer. The Millers' Natl. Ins. Co. v. Kimmerle, 150 Ill. 102.

Plaintiff based his statement of claim on two counts, one based on the policy and the other based on the alleged agreement for a settlement but he withdrew the former and went to trial on the latter. It will, therefore, be unnecessary to remand the cause.

For the reasons stated, the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that Brown had no authority to settle the plaintiff's claim and that no agreement for settlement was entered into.

TAYLOR AND O'CONNOR, JJ, CONCUR.

Plaintiff bases his statement of claim on two counts, one based on the verbal and the other based on the alleged agreement for a settlement but he withdrew the former and went to trial on the latter. It will, therefore, be unnecessary to remand the cause.

For the reasons stated, the judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

FINDING OF FACT: We find as a fact that there had no authority to settle the plaintiff's claim and that no agreement for settlement was in fact made.

NAVIN AND O'DONNOCH, JJ., CONCUR.

126 - 27076

JOHN F. DEVINE, Administrator of the Estate of John A. Benson, Deceased,

Appellee,

v.

C. A. CARLSON,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

227 I.A. 592

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Carlson, seeks to reverse a judgment for $2500.00 recovered by the plaintiff in the Superior Court of Cook County, following a verdict finding the issues for the plaintiff and assessing the damages at that amount.

The defendant was a contractor and in connection with his business, he owned and maintained a barn in which he stored certain building material. The barn was in the rear of premises occupied by the plaintiff's intestate Benson, who was employed by the defendant as a teamster and laborer. The south side of the barn bordered upon an alley. At the east end of the barn there was a room extending across the barn, in which there was a stall where a horse was kept. The west two-thirds of the barn consisted of a comparatively large room where building material was stored. Between these two rooms there was a stairway leading up to the second floor. In the storage room, some racks had been constructed several weeks prior to the occurrence involved in the case at bar, by one of defendant's employees, and a quantity of finished

JOHN E. DWYER, Administrator of the Estate of John A. Benson, Deceased,

Appellee,

v.

O. A. OAGLESON,

Appellant.

MR. PRESIDING JUSTICE TOMLINSON delivered the opinion of the court.

By this appeal the defendant, Oaleson, seeks to reverse a judgment for $2500.00 recovered by the plaintiff in the Superior Court of Cook County, following a verdict finding the issues for the plaintiff and assessing the damages at that amount.

The defendant was a contractor and in connection with his business, he owned and maintained a barn in which he stored certain building material. The barn was in the rear of premises owned by the plaintiff's intestate Benson, who was employed by the defendant as a teamster and laborer. The south side of the barn bordered upon an alley. At the east end of the barn there was a room extending across the barn, in which there was a stall where a horse was kept. The west two-thirds of the barn consisted of a comparatively large room where building material was stored. Between these two rooms there was a stairway leading up to the second floor. In the storage room, some tools had been constructed several weeks prior to the occurrence involved in the case at bar, by one of defendant's employees, and a quantity of finished

lumber was stored on these racks and from time to time, as it was needed, lumber was taken from the racks and Benson hauled it to the various jobs where it was to be used. The racks referred to were constructed of what are described in the testimony as "two by fours", a number of uprights being put in from the floor to the ceiling and cross pieces being nailed to the uprights at a point five or six feet above the floor. These cross pieces were nailed to the south side of the uprights and the lumber, as it lay on these cross pieces, extended north and south. The employee who constructed these racks, testified that he used ten-penny spikes and wire nails, and that he used two at each intersection of cross pieces and uprights. The name of this employee was Emil Carlson. He was not related to the defendant. He testified that the day in question was a cold day and that the streets were icy and slippery and Benson was told not to take his horse out that day; that he and Benson "worked around a little together" about eight o'clock in the morning; that, among other things, they carried a console from the barn to a building. The witness further testified that he later left Benson at the barn and went to another building and returned to the barn about ten o'clock in the forenoon and found Benson in the barn, dead. At the south end of the lumber rack between the two uprights at the west extremity, there was a cross piece nailed to those uprights two and a half or three feet above the floor. Benson's neck was lying on that cross piece, his head to the south and his body extending north under the lumber piled on the rack. The east end of the cross piece on which the lumber had been resting was still in place, but the west end was down and the lumber was resting on Benson's neck and head. Carlson, the witness above referred to, went for help, and with three others, raised the lumber, released

lumber was stored on these racks and from time to time, as it was needed, lumber was taken from the racks and barron hauled it to the various jobs where it was to be used. The racks referred to were constructed of what are described in the testimony as "two by fours", a number of uprights being put in from the floor to the ceiling and cross pieces being nailed to the uprights at a point five or six feet above the floor. These cross pieces were nailed to the south side of the uprights and the lumber, as it lay on these cross pieces, extended north and south. The employee who constructed these racks, testified that he used ten-penny spikes and wire nails, and that he used two at each intersection of cross pieces and uprights. The name of this employee was Neil Carlson. He was not related to the defendant. He testified that the day in question was a cold day and that the streets were icy and slippery and Barron was told not to take his horse out that day; that he and Jackson "worked or had a little loafing" about eight o'clock in the morning; that, among other things, they carried a cookstove from the barn to a building. The witness further testified that he later left Jackson at the barn and went to another building and returned to the barn about ten o'clock in the forenoon and found Jackson in the barn, dead. At the south end of the lumber rack between the two uprights at the west extremity, there was a cross piece nailed to these uprights two and a half or three feet above the floor. Barron's neck was lying on that cross piece, his head to the south and his body extending north under the lumber piled on the rack. The east end of the cross piece on which the lumber had been resting was still in place, but the west end was down and the lumber was resting on Barron's neck and head. Carlson, the witness above referred to, went for help, and with three others, raised the lumber, released

Benson's body and removed it. He testified that the nails had pulled out of the upper cross piece and let the lumber down. He also testified that the last time he saw Benson alive, he was working around the barn but did not remember just what he was doing.

The defendant had a sort of boss or superintendent named Anderson, who, as was the case with the previous witness referred to, was called by the plaintiff. He testified that he told Benson not to take his horse out on the day in question; that Benson had stated some time previously that he wanted a door put in between the part of the barn where the horse was kept and the feed room, at the northeast corner of the barn, and so, on that morning he directed Benson to clear out a lot of scrap lumber and cement bags that were lying in that part of the barn, saying that when that was done they would get one of the carpenters and have the door put in; and that he told Benson not to put the lumber he removed, in the barn, but in the basement of his house where it could be cut up for kindling wood as it was not suitable for anything else. Certain evidence was introduced by the defendant, to which, in our opinion, no reference need be made in detail.

In support of the appeal the defendant urges a number of points. He contends first that the evidence fails to establish the negligence charged, or any negligence. In our opinion the evidence is sufficient to support the verdict on this point. The declaration alleges that the defendant was negligent in failing to provide a safe place for the deceased to work. One E. Conrad Carlson testified that he saw the rack in question "around ten o'clock" on the morning Benson was killed; that the lumber was down in the west rack, the east end of the cross piece being up in place

Benson's body and removed it. He testified that the nails had pulled out of the upper crossbeams and let the lumber down. He also testified that the last time he saw Benson alive, he was working around the barn but did not remember just what he was doing.

The defendant [illegible] art of hers or superintendent named Anderson, who, as was the case with the previous witness related to, was called by the defendant. He testified that he told Benson not to take his horse [illegible] on the day in question; that Benson had another [illegible] time previously that he wanted a deer put in between the [illegible] of the barn where the horse was kept and the feed room, at the northeast corner of the barn, and so, on that morning he [illegible] Benson to clear out a lot of scrap lumber or [illegible] were lying in that part of the barn, saying that [illegible] one of the carpenters was [illegible]; [illegible] that he told Benson not to cut the lumber be[illegible], in the barn, but in the basement of the house [illegible] be cut up for kindling wood as it was not suitable [illegible]. Certain evidence was introduced by the defendant, to which, [illegible], no reference need be made in detail.

In [illegible] the court [illegible] a number of notices. The [illegible] trial [illegible] to notice tion the negligence charged, [illegible] negligence. In our opinion the evidence is sufficient to [illegible] the verdict on this point. The declaration alleges that the [illegible] negligent in failing to provide a safe place for the servant to work. The P. [illegible] Carlson testifies that he saw the [illegible] "around ten o'clock" on the morning [illegible] was killed; that the lumber was down in the west track, the east end of it [illegible] piled up in place

but the west end down; that there was one nail in the west end of the cross piece, which was a "cut nail",- a square nail, somewhat tapered - and that this nail extended through the cross piece about an inch or an inch and a quarter or half; that this nail had left a mark or "gouge" in the west upright about six feet above the floor.

The defendant objected to this witness "describing any conditions around there after this lumber had been moved and the character of the premises had been entirely changed" and the admission of the testimony is now assigned as error. This point was passed upon by this court on a former appeal of this case (Devine, Admr. v. Carlson, 207 Ill. App. 415) where the evidence referred to was held to be admissible, and, consequently, the question is not open to argument now. It may be said further, however, that from the testimony appearing in this record, it is entirely clear that there had been no change in the situation involved, between the time the body was discovered, and the time this witness observed the conditions about which he testified, so far as those conditions are concerned. As the plaintiff contends there was apparently no change in the cross piece or the upright in question, about which there could possibly be any controversy. A very short time had elapsed. Emil Carlson testified that when he discovered Benson's body "it must have been around ten o'clock or so". E. Conrad Carlson testified that he observed the conditions about which he testified "around ten o'clock." It is apparent from the testimony, that at the time Emil Carlson and his helpers took out the body, they merely raised the lumber so as to release the body and then lowered it onto the lower cross piece. He testified that at the time they removed the body they did not do anything with the loose cross piece -

but the west end down; that there was one nail in the west end of the cross piece, which was a "cut nail"- a square nail, commonly imported - and that this nail extended through the cross piece about an inch or an inch and a quarter or half; that this nail had left a mark or "gouge" in the post upright about six feet above the floor.

The defendant objected to this witness "describing any conditions around there after this timber had been moved and the character of the premises had been entirely changed" and the admission of the testimony is now assigned as error. This point was passed upon by this court on a former appeal of this case (Perkins, Adm. v. Carlson, 267 Ill. 229, 232) where the evidence referred to was held to be admissible, and, consequently, the question is not open to argument now. It may be said further, however, that from the testimony appearing in this record, it is entirely clear that there had been no change in the situation involved, between the time the body was discovered, and the time this witness observed the conditions about which he testified, so far as these conditions are concerned. As the plaintiff contends there was apparently no change in the cross piece or the upright in question, about which there could possibly be any controversy. A very short time had elapsed. Emil Carlson testified that when he discovered Swanson's body "it must have been around ten o'clock or so". He, Conrad Carlson testified that he observed the conditions about which he testified "around ten o'clock." It is apparent from the testimony, that at the time Emil Carlson and his helpers took out the body, they merely raised the timber so as to release the body and then lowered it onto the lower cross piece. He testified that at the time they removed the body they did not do anything with the lower cross piece -

that they "did not take out any nails or anything."

The defendant contends further, that if there was any negligence in the construction of these racks, it was the negligence of Emil Carlson who was a fellow servant of Benson and consequently the plaintiff cannot recover. This case does not present a situation for the application of the fellow servant rule. The duty of the defendant to provide his servant, Benson, with a reasonably safe place in which to work, was a personal one which could not be delegated by him, and if the duty was not properly performed, and damage has resulted, he is liable, whether he has attempted to perform it personally or through another, even though that other be another servant of his. As to Benson, the other servant stands in the position of a vice-principal and not a fellow servant. Baier v. Selke, 211 Ill. 512; Himrod Coal Co. v. Clark, 197 Ill. 514; Mobile & Ohio Railroad Co. v. Godfrey, 155 Ill. 78; Vancil v. Ill. Collieries Co. 152 Ill. App. 146.

It is urged further that the record is without evidence showing or tending to show that at the time of the occurrence in question, Benson was exercising due care for his own safety. No one witnessed the accident which took Benson's life. E. Conrad Carlson testified that he had known him for some time and that so far as he knew, he was an ordinarily careful, prudent man. It was admitted he was a sober man, of good conduct and habits. His wife testified that at the time of his death, Benson was thirty-nine years of age and in fine health. There was some attempt by the defendant to show that at the time Benson suffered his injury, he was nailing the lower cross piece, on which his neck was resting when his body was found, onto the uprights, and that this drove one of the uprights away from the upper

that they "did not take out any nails or anything."

The defendant contends further, that if there was any negligence in the construction of these tracks, it was the negligence of Gail Garrison who was a fellow servant of Benson and consequently the plaintiff cannot recover. This case does not present a situation for the application of the fellow servant rule. The duty of the defendant to provide his servant, Benson, with a reasonably safe place in which to work, was a personal one which could not be delegated by him, and if the duty was not properly performed, and damage has resulted, he is liable, whether he has attempted to perform it personally or through another, even though that other be another servant of his. As to Benson, the other servant stands in the position of a vice-principal and not a fellow servant. Baker v. Zahke, 211 Ill. 314; Illinois Coal Co. v. Clark, 197 Ill. 314; Mobile & Ohio Railroad Co. v. Duffey, 168 Ill. 79; Vandil v. Ill. Collieries Co. 182 Ill. App. 160.

It is urged further that the record is without evidence showing or tending to show that at the time of the occurrence in question, Benson was exercising due care for his own safety. No one witnessed the accident which took Benson's life. A. Conrad Garison testified that he had known him for some time and that so far as he knew, he was an ordinarily careful, prudent man. It was admitted he was a sober man, of good conduct and habits. His wife testified that at the time of his death, Benson was thirty-nine years of age and in fine health. There was some attempt by the defendant to show that at the time Benson suffered his injury, he was walking the lower cross piece, on which his body was resting when his body was found, onto the upright, and that this drove one of the uprights away from the upper

cross piece and let the lumber down. But this is merely a series of presumptions which have no basis in the testimony. An ordinary carpenter's hatchet was found on the floor near Benson's body. How it came there does not appear. Emil Carlson testified that he did not put this lower cross piece on. But whether he had ever seen it there before does not appear. The evidence does not show that it was not there previous to the day in question. Inour opinion, the jury had sufficient competent evidence before them to support their finding to the effect that Benson was in the exercise of due care. C.C.C. & St. L. Ry. v. Keenan, 190 Ill. 217; C.B.& Q. R. R. Co. v. Gunderson, 174 Ill. 495; Ill. Cent. Ry. v. Nowicki, 148 Ill. 29; Broadbent v. C.& G. T. Ry. Co., 64 Ill. App. 231.

It is finally contended by the defendant that there is no proof that at the time he suffered the injury causing his death, Benson was engaged in the performance of any duty, in connection with his employment, nor in doing anything under the direction of either the defendant or his superintendent.

The testimony of the latter, with reference to the scrap lumber and cement bags in the northeast part of the barn, has already been referred to. He was asked if he gave Benson any directions calling for the doing of anything about the racks in question or the lumber on them, on the day in question, and he said he had not. Benson's widow testified that she last saw her husband alive about nine o'clock on the morning of the day he was killed and at that time he was "carrying out lumber from the barn - planks." She further testified that about three or four weeks before Christmas (Benson was killed January 3,) she heard the defendant tell her husband he wanted him to clean

crown piece and let the lumber down. But this is merely a series of presumptions which have no basis in the testimony. An ordinary carpenter's bracket was found on the floor near Benson's body. How it came there does not appear. Neil Darlson testified that he did not put this power crane piece on. But whether he had ever seen it there before does not appear. The evidence does not show that it was not there previous to the day in question. Under opinion, the jury had sufficient competent evidence before them to support their finding to the effect that Benson was in the exercise of due care. C.C.C. & St. L. Ry. v. Keenan, 180 Ill. 217; C.B.& Q. R. R. Co. v. Gunderson, 174 Ill. 495; Ill. Cent. Ry. v. Bowlick, 148 Ill. 29; Broadhead v. C.& E. I. Ry. Co., 64 Ill. App. 321.

It is finally contended by the defendant that there is no proof that at the time he suffered the injury causing his death, Benson was engaged in the performance of any duty, in connection with his employment, nor in doing anything under the direction of either the defendant or his superintendent.

The testimony of the latter, with reference to the extra lumber and cement bags in the northwest part of the barn, has already been referred to. He was asked if he gave Benson any directions calling for the doing of anything about the tracks in question or the lumber on them, on the day in question, and he said he had not. Benson's widow testified that she last saw her husband alive about nine o'clock on the morning of the day he was killed and at that time he was "carrying out lumber from the barn - planks." The further testified that about three or four weeks before Christmas (Benson was killed January 5,) she heard the defendant tell her husband he wanted him to clean

out the barn; that they were in the kitchen of her home at the time and the defendant said that "any time he (Benson) had a chance, he should clean out the barn because he wanted to put a man in there to work, at the west end of the barn,- some kind of stair work."

That Benson had no occasion to be in the barn or in the room where the lumber racks were, except in connection with his employment as a servant of the defendant, seems clear. As to whether he was engaged in the course of his duties at the time he was killed, was one of the questions of fact forthe jury to determine from the evidence. In our opinion the evidence is not such as to warrant this court in disturbing their conclusion.

For the reasons stated, the judgment of the Superior Court is affirmed.

AFFIRMED.

O'CONNOR, J. CONCURS;
TAYLOR, J. DISSENTS.

and the barn; that they were in the kitchen of her home at the time and the defendant said that "my wife be (woman) had a chance, he could clean out the barn because he wanted to put a man in there to work, at the west end of the barn.- some kind of night work."

There thereon has no occasion to be in the barn or in the room where the lumber truck sats, except in connection with his employment as a servant of the defendant, some claim. As to whether he was engaged in the course of his duties at the time he was killed, was one of the questions of fact for the jury to determine from the evidence. In our opinion the evidence is not such as to warrant this court in disturbing their conclusion.

For the reasons stated, the judgment of the Superior Court is affirmed.

O'CONNELL, J. concurs;
TAYLOR, J. dissents.

144 - 27097

EDWIN J. EVANS,

Appellant,

v.

JAMES J. KELLY, As Executor under the Last Will and Testament of ROSA A. BENSON, Deceased, and the PROVIDENT LIFE AND TRUST, a corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

227 I.A. 593

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant Evans filed his bill in the Superior Court of Cook County, seeking to foreclose a mechanic's lien on property which had been owned by Rosa A. Benson, one of the defendants, in her life time, on which there was a mortgage in the hands of the Provident Life and Trust Company of Philadelphia and which was under lease to one Meinhardts. The cause was referred to a Master, who, after hearing, submitted his report to the Superior Court, in which he found the complainant was entitled to the lien claimed, in the sum of $747.53, and recommended that his claim for lien be allowed. Exceptions to the report of the Master were duly interposed by the defendants and these exceptions were sustained by the chancellor, and a decree was entered, dismissing the bill for want of equity. To reverse that decree, the complainant has perfected this appeal.

By his bill the complainant alleged that he was a contractor and builder; that the Meinhardts were tenants of certain lands and buildings owned by Mrs. Benson and that on or about December 15, 1913, they engaged the complainant to

144 - 27027

KIRBY J. EVANS,

Appellant,

v.

JAMES J. KELLY, as Executor under the last will and testament of ROSA A. BENSON, Deceased, and the PROVIDENT LIFE AND TRUST, a corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant Evans filed his bill in the Superior Court of Cook County, seeking to foreclose a mechanic's lien on property which had been owned by Rosa A. Benson, one of the defendants, in her life time, on which there was a mortgage in the hands of the Provident Life and Trust Company of Philadelphia and which was under lease to one Reinhardt. The cause was referred to a Master, who, after hearing, submitted his report to the Superior Court, in which he found the complainant was entitled to the lien claimed, in the sum of $747.53, and recommended that his claim for lien be allowed. Exceptions to the report of the Master were duly interposed by the defendants and these exceptions were sustained by the chancellor, and a decree was entered, dismissing the bill for want of equity. To reverse that decree, the complainant has perfected this appeal.

By his bill the complainant alleged that he was a contractor and builder; that the defendants were tenants of certain lands and buildings owned by Mrs. Benson and that on or about December 15, 1913, they engaged the complainant to

make certain repairs, alterations, decorations and improvements, upon said property; that Rosa A. Benson, the owner of the property, authorized and knowingly permitted the Meinhardts to contract with the complainant for this work; that there was a written agreement between Rosa A. Benson and the Meinhardts, by the terms of which the Meinhardts were to make certain repairs and Rosa A. Benson was to allow them the sum of $900.00 on account of rent which was to be used inpayment for the repairs; that the complainant commenced this work on December 15, 1913, and completed it on or about January 3, 1914, and that the work was duly accepted by the Meinhardts. The bill further contained the usual allegations as to the quality of the work done, and its fair and reasonable value, and further sets forth that on February 5, 1914, the complainant filed his claim for mechanic's lien in the office of the Clerk of the Superior Court of Cook County.

It seems that Rosa A. Benson died on or about January 1, 1914. The defendant James J. Kelly, had acted as her agent and attorney, with regard to the property in question, previous to that time, and he was the Executor and Trustee under her Will. The answer filed by him to the bill of complaint, admitted the tenancy of the Meinhardts but denied that the complainant had furnished the labor and material as claimed by him in his bill of complaint, or that Rosa A. Benson had authorized or knowingly permitted the Meinhardts to enter into any agreement with the complainant for the work in question. The answer admitted the existence of the agreement between Rosa A. Benson and the Meinhardts whereby the former was to allow $900.00 on the rent and the latter were to expend such funds in the making of repairs. The answer of Kelly further denied that the complainant performed any work on the premises in

make certain repairs, alterations, decorations and improvements, upon said property; that Rose A. Benson, the owner of the property, authorized and knowingly permitted the Weinberds to contract with the complainant for this work; that there was a written agreement between Rose A. Benson and the Weinberds, by the terms of which the Weinberds were to make certain repairs and Rose A. Benson was to allow them the sum of $800.00 on account of rent which was to be used exclusively for the repairs; that the complainant commenced the work on December 15, 1914, and completed it on or about January 3, 1915, and that the work was duly accepted by the Weinberds. The bill further contained the usual allegations as to the quality of the work done, and its fair and reasonable value, and further sets forth that on February 5, 1914, the complainant filed his claim for mechanic's lien in the office of the Clerk of the Superior Court of Cook County.

It seems that Rose A. Benson died on or about January 1, 1916. The defendant James C. Kelly, had acted as her agent and attorney, with regard to the property in question, previous to that time, and he was the Executor and Trustee under her Will. The answer filed by him to the bill of complaint, admitted the tenancy of the Weinberds but denied that the complainant had furnished the labor and material as claimed by him in his bill of complaint, or that Rose A. Benson had authorized or knowingly permitted the Weinberds to enter into any agreement with the complainant for the work in question. The answer admitted the existence of the agreement between Rose A. Benson and the Weinberds whereby the former was to allow $800.00 on the rent and the latter were to expend such funds in the making of repairs. The answer of Kelly further denied that the complainant performed any work on the premises in

question under any contract between himself and the Meinhardts, but alleged that on or about December 10, 1913, the complainant entered into an agreement with the Meinhardts, whereby he was to purchase from them one half of the capital stock of a corporation known as the Lake Shore Hospital Association, which hospital was the occupant of the premises in question, for the sum of $1,250.00; and that, pursuant to that agreement, the complainant received one-half of the hospital stock and paid the Meinhardts $500.00 toward the purchase price and agreed to pay the balance of $750.00 on or before January 10, 1914, and that after acquiring this interest in the stock of the hospital, the complainant and the Hospital Association made an agreement with one Vincent F. Boyle whereby Boyle was to furnish the labor and material incident to the making of the repairs in question and that Boyle was the one who did the work and was paid therefor, in full, by the Hospital Association. The answer further states that when the agreement, above referred to, was made between Rosa A. Benson and the Meinhardts, such agreement was known to the complainant and that the latter understood that the contractor who was to make the repairs was to look solely to the Meinhardts and the Hospital Association for payment. There were further allegations in this answer, in general denial of the allegations contained in the bill of complaint.

In our opinion, the principal if not the sole question involved on this appeal is a question of fact as to whether the complainant or Boyle was the contractor on this work. That the work was actually done by Boyle and men hired by him, is not disputed, but it is the position of the complainant that he was the contractor for the work and that Boyle was engaged on the job as his foreman.

question under any contract between himself and the Reinhardts, but alleged that on or about December 10, 1912, the complainant entered into an agreement with the Reinhardts, whereby he was to purchase from them one half of the capital stock of a corporation known as the Lake Shore Hospital Association, which hospital was the occupant of the premises in question, for the sum of $1,800.00; and that, pursuant to that agreement, the complainant received one-half of the hospital stock and paid the Reinhardts $900.00 toward the purchase price and agreed to pay the balance of $750.00 on or before January 10, 1914, and that after acquiring this interest in the stock of the hospital, the complainant and the Hospital Association made an agreement with one Vincent V. Doyle whereby Doyle was to furnish the labor and material incident to the making of the repairs in question and that Doyle was the one who did the work and was paid therefor, in full, by the Hospital Association. The answer further alleges that when the agreement, above referred to, was made between Ross A. Hanson and the Reinhardts, such agreement was known to the complainant and that the latter understood that the contractor who was to make the repairs was to look solely to the Reinhardts and the Hospital Association for payment. There were further allegations to this answer, in general denial of the allegations contained in the bill of complaint.

In our opinion, the principal if not the sole question involved on this appeal is a question of fact as to whether the complainant or Doyle was the contractor on this work. That the work was actually done by Doyle and was hired by him, is not disputed, but it is the contention of the complainant that he was the contractor for the work and that Doyle was engaged on the job as his foreman.

Evans testified that he was a contractor and that on or about November 1, 1913, Dr. Maximilian Meinhardt called him over to the Lake Shore Hospital, the premises in question, and asked him to do the work involved in these repairs which form the subject-matter of this controversy, and that he told the doctor that the job was worth $800.00; that a few days later the doctor advised him that he was the lowest bidder and he arranged to begin the first or second week in December. He further testified that at thetime this arrangement was entered into, he had previously done some repairing on the plaster, the floors, and the windows, to the extent of $50.00 or $60.00, which was in addition to the $800.00, which latter item covered redecorating; that he began the redecorating about December 15, and finished the first week in January; that he was personally present in charge of the work; that he saw Kelly at the Hospital about December 20, with Mrs. Benson and Dr. Meinhardt; that he (Evans) came there at that time on appointment to see Kelly; that he and Kelly went through the building, looking at the work that had to be done; and that at this time Kelly made certain inquiries about what the work involved; that Kelly asked what the price was to be, and he told him about $800.00, and that Kelly said he realized the building was in bad shape, but asked him to keep the price as low as possible. He testified in detail as to what the work in question consisted of. On cross-examination, he testified that he had twenty-five shares of the stock of the Lake Shore Hospital andthat at the time the contract for the work in question was entered into with the Meinhardts he had no partnership or other business relation with them; that Kelly told him to go ahead and do the work on the Hospital; that he did not know how many houses he had painted in the last twenty

Evans testified that he was a contractor and that on or about November 1, 1913, Mr. Maximilian Reinhardt called him over to the Lake Shore Hospital, the premises in question, and asked him to do the work involved in these repairs which form the subject-matter of this controversy, and that he told the doctor that the job was worth $800.00; that a few days later the doctor advised him that he was the lowest bidder and he arranged to begin the first of second week in December. He further testified that at the time this arrangement was entered into, he had previously done some repairing on the plaster, the floors, and the windows, to the extent of $50.00 or $60.00, which was in addition to the $800.00, which latter item covered redecorating; that he began the redecorating about December 15, and finished the first week in January; that he was personally present in charge of the work; that he saw Kelly at the Hospital about December 20, with Mr. Hanson and Mr. Reinhardt; that Mr (Evans) came there at that time on appointment to see Kelly; that he saw Kelly went through the building, looking at the work that had to be done; and that at this time Kelly made certain inquiries about what the work involved; that Kelly asked what the price was to be, and he told him about $800.00, and that Kelly said he realized the building was in bad shape, but asked him to keep the price as low as possible. He testified in detail as to what the work in question consisted of. On cross-examination, he testified that he had twenty-five shares of the stock of the Lake Shore Hospital outright at the time the contract for the work in question was entered into with the Reinhardts he had no partnership or other business relation with them; that Kelly told him to go ahead and do the work on the hospital; that he did not know how many houses he had painted in the last twenty

years, but it was comparatively few,- that "is not my specialty". The witness denied that Kelly had said to him and Dr. Meinhardt that he did not want any mechanic's liens on the building and denied that he, Evans, had said there was to be no mechanic's lien. On the contrary, he testified that Kelly told him to go ahead with the work and that he would be responsible for the work up to $900.00. He further testified that Boyle was his foreman on that work. He was asked where Boyle lived and he said he did not know.

For the defendants, Kelly testified that in his conversation with the complainant in December, those present in addition to himself, were Dr. Meinhardt and his wife; that Dr. Meinhardt had advised him that Evans was associated with him in the hospital and asked him to come over and meet him; that at this meeting they discussed the alterations that were to be made in the hospital and that he was informed, both by Dr. Meinhardt and the complainant, that repairs to the extent of about $900.00 were to be made on the hospital, which were to be paid for by Evans; that Evans had subscribed for $1,250.00 worth of the stock in the Hospital Association, and that he had paid $500.00 in cash, and in further consideration he had agreed to pay Boyle $365.00 for painting and decorating, and that he was to pay for the balance of the repairs that were to be made, all in consideration for the stock for which he had subscribed in the Hospital Association. Kelly further testified that he told Evans and Dr. Meinhardt, at that time, that he did not want any work done on the building unless it was paid for, and that he wanted no liens, mentioning his doubt of the solvency of Meinhardt; that in this conversation, in the presence of Evans, Dr. Meinhardt said there would

years, but it was comparatively few,- that "is not my specialty". The witness denied that Kelly had said to him and Dr. Reinhardt that he did not want any mechanic's liens on the building and denied that he, Evans, had said there was to be no mechanic's lien. On the contrary, he testified that Kelly told him to go ahead with the work and that he would be responsible for the work up to $900.00. He further testified that Boyle was his foreman on that work. He was asked where Boyle lived and he said he did not know.

For the defendants, Kelly testified that in his conversation with the complainant in December, those present in addition to himself, were Dr. Reinhardt and his wife; that Dr. Reinhardt had advised him that Evans was associated with him in the hospital and asked him to come over and meet him; that at this meeting they discussed the alterations that were to be made in the hospital and that he was informed, both by Dr. Reinhardt and the complainant, that repairs to the extent of about $900.00 were to be made on the hospital, which were to be paid for by Evans; that Evans had subscribed for $1,500.00 worth of the stock in the Hospital Association, and that he had paid $500.00 in cash, and in further consideration he had agreed to pay Boyle $300.00 for painting and decorating, and that he was to pay for the balance of the repairs that were to be made, all in consideration for the stock for which he had subscribed in the Hospital Association. Kelly further testified that he told Evans and Dr. Reinhardt, at that time, that he did not want any work done on the building unless it was paid for, and that he wanted no liens, mentioning his doubt of the solvency of Reinhardt; that in this conversation, in the presence of Evans, Dr. Reinhardt said there would

be no bills on these repairs, for Evans was going to pay for everything that was done. Kelly stated that he gave no directions at any time with regard to any work that was done on the premises; that he did not go over the premises, as Evans had testified, nor discuss any of the details of the work; that in this conversation, Evans told him that he was associated with Meinhardt in the conduct of the hospital, and he asked Kelly if there could not be a little better allowance to the Association, than $900.00 toward the repairs; that there was some discussion about some insurance or taxes, and his recollection was that Evans gave him his personal check to cover the insurance premiums. The witness denied that he had asked Evans to keep the cost of the work as low as he could. On cross-examination, Kelly testified that the complainant and Dr. Meinhardt, in the conversation referred to, told him they had given the contract forthe decorating to Boyle for $365.00; that he did not ask them to procure waivers of mechanic's liens but merely said that he did not want any liens on the building.

Mrs. Meinhardt was the secretary of the Hospital Association. She testified as to the arrangements made with Boyle for the painting and redecorating of the premises and that the amount involved was $359.00.

Dr. Meinhardt testified that in December, 1913, the complainant took a one-half interest in the Hospital Association; that the hospital was to be redecorated and he took this question up with Mr. Evans and the latter suggested that they procure bids; that they communicated with several contractors; that Boyle was one of the bidders; that Boyle was a tenant of the complainant and had done work at the hospital previous to the time Evans became connected with it; that after the bids

to be paid on these repairs, for Evans was going to pay for everything that was done. Kelly stated that he gave no directions at any time with regard to any work that was done on the premises; that he did not go over the premises, as Evans had testified, nor discuss any of the details of the work; that in this conversation, Evans told him that he was associated with Reinhardt in the conduct of the hospital, and he asked Kelly if it be possible not be a little better allowance to the Association, then $900.00 toward the repairs; that there was some discussion about some insurance or taxes, and his recollection was that Evans gave his his personal check to cover the insurance premiums. The witness stated that he had asked Evans to keep the cost of the work as low as he could. On cross-examination, Kelly testified that the complainant and Dr. Reinhardt, in the conversation referred to, told him they had given the contract letter according to Doyle for $565.00; that he did not ask them to produce waivers of mechanic's liens but merely said that he did not want any liens on the building.

Mrs. Reinhardt was the secretary of the Hospital Association. She testified as to the arrangements made with Doyle for the painting and redecorating of the premises and that the amount involved was $525.00.

Dr. Reinhardt testified that in December, 1913, the complainants took a one-half interest in the Hospital Association; that the hospital was to be redecorated and he took this over-sight up with Mr. Evans and the latter suggested that they procure bids; that they communicated with several contractors; that Doyle was one of the bidders; that Doyle was a tenant of the complainant and had done work on the hospital previous to the time Evans became connected with it; that after the bids

were received, he conferred with Evans again and they agreed to give the contract to Boyle, who proceeded to do the work. He testfied that the arrangements were entered into with Boyle, covering this work, at the home of the complainant when the latter was sick in bed; that Evans had his wife telephone for Boyle to come over, and that when Boyle arrived, Evans and the witness told him that he was the lowest bidder and they wanted to have the work done quickly; that Boyle said he might be delayed a little because of selling Christmas trees; that they urged him to proceed as soon as possible, and that he started the work the next day; that the complainant told Boyle he (Evans) was responsible for the payment of the bill and told him about the transaction covering the sale of the stock of the Hospital Association from Dr. Meinhardt to Evans. Dr. Meinhardt further testified that in consideration for the $1,250.00 worth of hospital stock, the complainant paid $500.00 in cash; that he was to pay Boyle $360.00 for the decorating and be allowed sixty or seventy dollars for the carpenter work and glazing work he (Evans) had done in November, and that he gave the Hospital Association a check for something over two hundred dollars to make up the difference, on which check he later stopped payment. This witness corroborated Kelly as to the conversation between himself and Kelly and the complainant in December, saying that he explained the stock deal to Kelly, told Kelly about giving Boyle the contract for decorating and that they tried to arrange with Kelly for upwards of $900.00 to meet the cost of all repairs and redecorating. He also testified that there was no remark by Kelly urging the complainant to keep the bill as low as he could. Both Dr. Meinhardt and Kelly testified that in this conversation the complainant suggested the assignment of the

were received, he conferred with Evans again and they agreed to give the contract to Doyle, who proceeded to do the work. He testified that the arrangements were entered into with Doyle, covering this work, at the home of the complainant when the latter was sick in bed; that Evans had his wife telephone for Doyle to come over, and that when Doyle arrived, Evans and the witness told him that he was the lowest bidder and they wanted to have the work done quickly; that Doyle said he might be delayed a little because of selling Christmas trees; that they urged him to proceed as soon as possible, and that he started the work the next day; that the complainant told Doyle he (Evans) was responsible for the payment of the bill and told him about the transaction covering the sale of the stock of the Hospital Association from Dr. Reinhardt to Evans. Dr. Reinhardt further testified that . a consideration for the $1,500.00 worth of hospital stock, the complainant paid $500.00 in cash; that he was to pay Doyle $300.00 for the decorating and he allowed him, or savings dollars for the carpenter work and glazing work he (Evans) had done in November, and that he gave the Hospital Association a check for something over two hundred dollars to make up the difference, on which check he later stopped payment. This witness corroborated Kelly as to the conversation between himself and Kelly and the complainant in December, saying it was explained the stock deal to Kelly, told Kelly about giving Doyle the contract for decorating and that they tried to arrange with Kelly for payment of $300.00 to cover the cost of oil repairs and redecorating. He also testified that there was no remark by Kelly urging the complainant to keep thoughts as low as he could. Both Dr. Reinhardt and Kelly testified that in this conversation the complainant suggested the assignment of the

lease to the Hospital Association, which was not done. He also testified that the complainant did some carpenter repairing but that he did no painting or decorating on the hospital property and further that the stock in the Hospital Association was duly issued to Evans in full payment of the decorating as set forth above. He also testified that Kelly had stated in the conversation with the plaintiff and himself that he wanted no mechanic's lien on the building and that Evans replied: "There will be no mechanic's liens, because the doctor and I have an understanding on this, in the payment of this money I have gone in with the doctor." He further testified that in connection with the purchase of the stock from the Hospital Association, complainant was given credit for the $360.00 for the redecorating of the hospital and that he also received credit for the value of the carpenter and glazing work he had done. He testified that the complainant was his partner, having the same amount of stock in the hospital as he had; that they were to divide the profits equally. His testimony was that this December conversation between Kelly, the complainant and himself, was had before the work was commenced and that Kelly was never at the hospital while the work was in progress.

In rebuttal, complainant called Boyle as a witness. He was shown a bill referred to as Defendant's Exhibit 1, which was dated December 1, 1913. The heading on this bill reads as follows:

"Mr. E. J. Evans, Lake Shore Hospital.

To V. F. Boyle, Dr.
Painter and Decorator. "

The bill then sets forth two items, one for burlaping and

lease to the Hospital Association, which was not done. He also testified that the complainant did some carpenter repairing but that he did no painting or decorating on the hospital property and further that the stock in the hospital association was duly issued to Evans in full payment of the decorating as set forth above. He also testified that Kelly had stated in the conversation with the chairman and himself that he wanted no mechanic's lien on the building and that Evans replied: "There will be no mechanic's lien, because the doctor and I have an understanding on this, in the payment of this money I have gone in with the doctor." He further testified that in connection with the purchase of the stock from the Hospital Association, complainant was given credit for the $350.00 for the redecorating of the hospital and that he also received credit for the value of the carpenter and glazing work he had done. He testified that the complainant was his partner, having the same amount of stock in the hospital as he had; that they were to divide the profits equally. He testimony was that the December conversation between Kelly, the complainant and himself, was had before the work was commenced and that Kelly was never at the hospital while the work was in progress.

In rebuttal, complainant called Doyle as a witness. He was shown a bill referred to as Defendant's Exhibit 1, which was dated December 1, 1932. The wording on this bill reads as follows:

"Mr. E. J. Evans, Lake Shore Hospital.

To V. N. Doyle, Dr.
Painter and decorator."

The bill then sets forth two items, one for painting and

painting ceilings and walls of office "as per contract" and, another for refinishing floor, painting desk and chair, touching up woodwork in front hall. Payment in full was acknowledged under date of December 6, 1913. The witness testified that the bill was paid by Dr. Meinhardt. He said the bill came to be made out to the complainant, Evans, in this way; that he first made it out to the Lake Shore Hospital and took it over to Dr. Meinhardt and the latter told him to make it out to Evans and the bill would be paid, so he put the name of Evans in and then he went to Evans and the latter told him to go back to Meinhardt and he would pay the bill, and that he went back and the bill was paid. He further testified that after the time mentioned in this bill he had a conversation with Evans about other work at the hospital; that the complainant asked him to take charge of this work; that he told the witness to go ahead and act as foreman and take charge of the work in general, which he did; that this conversation took place at the home of the complainant, who was not sick in bed at the time but was sitting in his office; that Dr. Meinhardt was not present at the time; that he was not told he was the lowest bidder or that they wanted the work done quickly and that he did not say he would be delayed because of his arrangement for selling Christmas trees; that nothing of this kind took place. He further testified that he procured most of the material for the work in question from a man named Rockefellow; that he also brought some of the material over from the complainant's shop; that the men on the job were paid by the complainant and that the complainant paid the witness Boyle; that he bought the material in the name of the complainant, Evans, and none in his own name. On cross-examination this witness said he was a painter and decorator and that he also sold Christmas trees;

painting ceilings and walls of office "as per contract" and, another for refinishing floor, painting desk and chair, tonguing up woodwork in front hall." Payment in full was acknowledged under date of December 6, 1913. The witness testified that the bill was paid by Dr. Reinhardt. He said the bill came to be made out to the complainant, Evans, in this way; that he first made it out to the Lake Shore Hospital and took it over to Dr. Reinhardt and the latter told him to make it out to Evans and the bill would be paid, so he put the name of Evans in and then he went to Evans and the latter told him to go back to Reinhardt and he would pay the bill, and that he went back and the bill was paid. He further testified that after the time mentioned in the bill he had a conversation with Evans about other work at the hospital; that the complainant asked him to take charge of this work; that he told the witness to go ahead and act as foreman and take charge of the work in general, which he did; that this conversation took place at the home of the complainant, who was not sick in bed at the time but was sitting in his office; that Dr. Reinhardt was not present at the time; that he was not told he was the lowest bidder or that they wanted the work done quickly and that he did not say he would be delayed because of his arrangement for painting Christmas trees; that nothing of this kind took place. He further testified that he procured most of the material for the work in question from a man named Rockefellow; that he also brought some of the material over from the complainant's shop; that the men on the job were paid by the complainant and that the complainant paid the witness Boyle; that he bought the material in the name of the complainant, Evans, and none in his own name. On cross-examination this witness said he was a painter and decorator and that he also sold Christmas trees;

that he never took any contract for the complainant but had been working for him by the day.

The complainant also called one McDonald, in rebuttal, who testified that he was a journeyman painter and decorator and also a contractor; that he worked at the premises of the Lake Shore Hospital in December 1913 and January 1914, as a journeyman; that he knew Boyle and the complainant; that he worked on this job as a sort of foreman under Boyle and also as a mechanic; that he was paid for his work by the complainant and not by Boyle. On cross-examination he testified he had orders from complainant and bought material for this work from Rockefellow and he saw complainant about the building nearly every day while the redecorating was being done; that he took orders on the job from Boyle and the complainant.

Counsel for the complainant testified in complainant's behalf, in rebuttal, to a conversation he had had with Dr. Meinhardt and also testified about a meeting in his office between the complainant, Dr. Meinhardt, and one Babcock, the latter stating that Dr. Meinhardt had asked him to call and see the witness with regard to some stock Evans had secured in the Hospital Association, on which Dr. Meinhardt claimed Evans owed a balance, which fact the latter disputed; that Babcock further stated at that time that inasmuch as the Hospital Association was not in good financial condition, and as Evans and Meinhardt were in effect partners, he wanted to try to make some arrangement whereby they could raise some money to get along. The witness further stated that at that time Evans said he did not want to loan any money to Meinhardt or the Hospital Association; that he asked Dr. Meinhardt if he would assign the lease to the Association and he said he would not,

that he never took any contract for the complainant but had been working for him by the day.

The complainant also called one McDonald, in rebuttal, who testified that he was a journeyman painter and decorator and also a contractor; that he worked at the premises of the Lake Shore Hospital in December 1913 and January 1914, as a journeyman; that he knew Doyle and the complainant; that he worked on this job as a part of foreman under Doyle and also as a mechanic; that he was paid for his work by the complainant and not by Doyle. On cross-examining he testified he had orders from complainant and brought material for this work from Rockefeller and he saw complainant about the building nearly every day while the redecorating was being done; that he took orders on the job from Doyle and his co-claimant.

Counsel for the complainant testified in complainant's behalf, in rebuttal, to a conversation he had had with Mr. Weinhardt and also testified about a meeting in his office between the complainant, Mr. Weinhardt, and one Balcomb, the latter stating that Mr. Weinhardt had asked him to call and see the writers with respect to some stock Vanes had secured in the Hospital Association, on which Mr. Weinhardt claimed Vanes owed a balance, which fact the latter disputed; that Babcock further stated at that time that inasmuch as the Hospital Association was not in good financial condition, and as Vanes and Weinhardt were in effect partners, he wanted to try to make some arrangement whereby they could raise some money to get along. The witness further stated that at that time Vanes said he did not want to loan any money to anybody or the Hospital Association; that he asked Mr. Weinhardt if he would assign the loans to the Association and he said he would not.

whereupon, the witness stated that he could not advise Evans to advance any money to the Association to meet the expenses of operating the hospital.

The complainant testified in rebuttal, to this conference in the office of his attorney, at which Babcock was the spokesman for Dr. Meinhardt, at which time Babcock explained that the hospital was short of funds, and the witness stated he had loaned Dr. Meinhardt $500.00 and got some stock as collateral, which was no good, and he was not going to put any more money into it. The witness further testified that he paid for all the material and labor used in redecorating the hospital. On cross-examination he testified that he was not a stockholder in the Hospital Association but that he held the stock as collateral; that the conference in his lawyer's office, referred to above, took place in February 1914. He also testified that he went to the hospital one Saturday evening and found Dr. Meinhardt very much excited; that the latter said the hospital funds had been burglarized and he had no money to pay his nurses and meet the pay-roll, whereupon, he, the complainant, gave Dr. Meinhardt a check for $250.00 for that purpose. The witness further testified that his wife accompanied him to the hospital on this occasion and while he and Dr. Meinhardt were conversing, his wife was talking with Mrs. Meinhardt in another room; that when he and his wife got home she stated that there was something wrong between Dr. Meinhardt and his wife; that he had not been giving her any money for some time and that Mrs. Meinhardt had told her that she had found some money in the safe that day and had taken it; and the witness testified he had immediately, upon learning this, gone to the bank and stopped payment on this check, "because I was not going to be a sucker. * * * I didn't feel kindly to any more business dealings with the doctor at all.

thereupon, the witness stated that he could not advise Evans to advance any money to the Association to meet the expenses of operating the hospital.

The complainant testified in rebuttal, to this conference in the office of his attorney, at which Babcock was the spokesman for Mr. Weinhardt, at which time Babcock explained that the hospital was short of funds, and the witness stated he had loaned Mr. Weinhardt $500.00 and got some stock as collateral, which was no good, and he was not going to put any more money into it. The witness further testified that he paid for all the material and labor used in redecorating the hospital. On cross-examination he testified that he was not a stockholder in the Hospital Association but that he held the stock as collateral; that the conference in Mr. Lawyer's office, referred to above, took place in February 1914. He also testified that he went to the hospital one Saturday evening and found Mr. Weinhardt very much excited; that the latter said the hospital funds had been burglarized and he had no money to pay his nurses and meet the pay-roll. Thereupon, he, the complainant, gave Mr. Weinhardt a check for $480.00 for that purpose. The witness further testified that his wife accompanied him to the hospital on this occasion and while he and Mr. Weinhardt were conversing, his wife was talking with Mrs. Weinhardt in another room; that when he and his wife got home she stated that there was something wrong between Mr. Weinhardt and his wife; that he had not been giving her any money for some time prior thereto. Weinhardt had told her that he had found some money in the safe that day and had taken it; and the witness testified he had immediately, upon leaving this, gone to the bank and stopped payment on this check, "because I was not going to be a sucker. * * * I didn't feel kindly to any more business dealings with the doctor at all.

I had had enough of him." The complainant further testified that he was not certain whether he ever sent a bill for the redecorating in question; that the $500.00 he gave Meinhardt was a loan on which the stock he held was collateral, and that he demanded the return of his money many times, "in 1914, around February or March."

On this testimony we are of the opinion that it is clearly shown that the complainant was not the contractor on this work. We have set forth the substance of the testimony fully and it would serve no useful purpose to analyze it in detail. We appreciate the fact that the Master saw the witnesses and heard them testify and that he made a finding in favor of the complainant, and that he had a better opportunity to judge of the value of the testimony of the various witnesses than the chancellor had. We are nevertheless constrained to affirm the decree of the chancellor. The manner in which Boyle made out his bill for work done in the fall of 1913, as shown in Defendant's Exhibit 1, above referred to, is significant. It is also significant that the complainant never submitted a bill for the work in controversy in this case, to anybody. All he did was file a claim for lien in February, 1914. In our opinion another significant fact is that he filed his claim for lien just after he and Dr. Meinhardt had apparently had some sort of a falling out, involving among other things, his giving the Doctor his check for $250.00, and then stopping payment on it. There is no corroboration in the record of the complainant's claim that he was the contractor, aside from the statement made by Boyle that he was the foreman. It may well be that Evans paid the men and paid for the material but that is quite as consistent with the theory that he was doing this work in considera-

I had had enough of him." The complainant further testified that he was not certain whether he ever sent a bill for the tobacco-curing in question; that the $500.00 he gave Weinhardt was a loan on which the stock he said was collateral, and that he demanded the return of his money many times, "in 1914, around February or March."

On this testimony we are of the opinion that it is clearly shown that the complainant was not the contractor in this work. We have set forth the substance of the testimony fully and it would serve no useful purpose to analyze it in detail. We appreciate the fact that the master saw the witnesses and heard them testify and that he had a finding in favor of the complainant, and that he had a better opportunity to judge of the value of the testimony of the various witnesses than the chancellor has. We are nevertheless constrained to affirm the decree of the chancellor. The manner in which Doyle made out his bill for work done in the fall of 1913, as shown in Defendant's Exhibit 1, above referred to, is significant. It is also significant that the complainant never submitted a bill for his work in curing-room in this case, to anybody. All he did was file a claim for lien in February, 1914. In our opinion another significant fact is that he filed his claim for lien just after he had a. Weinhardt had apparently had some sort of a falling out, involving among other things, his giving the master his check for $[illegible], and then stopping payment on it. There is no corroboration in the record of the complainant's claim that he was the contractor, aside from the statement made by Doyle that he was the foreman. It may well be that Evans paid the men and said for his material but that is quite as consistent with the theory that he was doing this work in consideration

tion for the stock, as testified to by the witnesses for the defendants, as that he was doing it as a contractor. Some of the testimony of Boyle tends to corroborate the witnesses for the defendants rather than the complainant.

We are further of the opinion that even if we were to assume that the complainant did this work as a contractor, nevertheless, the preponderance of the evidence is to the effect that complainant waived any right he might have in the way of a lien.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

DECREE AFFIRMED.

O'CONNOR AND TAYLOR, JJ, CONCUR.

tion for the stock, as testified to by the witnesses for the defendants, as that he was acting as a contractor. None of the testimony of Doyle tends to corroborate the witnesses for the defendants rather than the complainant.

We are further of the opinion that even if we were to assume that the complainant did this work as a contractor, nevertheless, the preponderance of the evidence is to the effect that complainant waived any right he might have in the way of a lien.

We find no error in the record and therefore the decree of the Superior Court is affirmed.

JUDGES AFFIRMED.

O'CONNOR AGE PRINTING, VA. NORFOLK.

168 - 27123

M. H. BARSNESS,
Appellee,

v.

HOTEL LA SALLE COMPANY,
a corporation,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

227 I.A. 594

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, M. H. Barsness, brought this action against the Hotel La Salle Company seeking to recover the value of a suit case and the contents, which the plaintiff claimed had been lost through the negligence of the defendant's servants, in connection with their transportation on a taxicab from the Hotel La Salle to the Dearborn Street Station in the City of Chicago. The issues were tried before a jury resulting in a verdict for the plaintiff in the sum of $400.00, to reverse which the defendant has perfected this appeal.

The plaintiff was a resident of Superior, Wisconsin, Upon reaching Chicago from that City on his way to West Baden, Indiana, not being able to secure a room at the La Salle Hotel, he checked his baggage at that hotel and secured accommodations elsewhere until the following day. On the evening of the following day, he was joined by three friends from Superior, a Mr. Hentzen and a Mr. and Mrs. Russell, at the Hotel LaSalle. They secured their baggage and engaged the taxicab in question to take them to the railroad station. They had considerable baggage, consisting of grips, suit cases and golf bags. As

E. H. BARKEMEYER, Appellee,	
v.	
HOTEL LA SALLE COMPANY, a corporation, Appellant.	

APPEAL FROM
MUNICIPAL COURT,
COOK COUNTY.

Mr. PRESIDING JUSTICE TRUMBULL delivered the opinion of the court.

The plaintiff, E. H. Barkemeyer, brought this action against the Hotel La Salle Company seeking to recover the value of a suit case and the contents, which the plaintiff claimed had been lost through the negligence of the defendant's servants, in connection with their transportation on a taxicab from the Hotel La Salle to the Northern Street Station in the City of Chicago. The issues were tried before a jury resulting in a verdict for the plaintiff in the sum of $400.00, to reverse which the defendant has perfected this appeal.

The plaintiff was a resident of Superior, Wisconsin. Upon reaching Chicago from that city on his way to Fort Wayne, Indiana, not being able to secure a room at the La Salle Hotel, he checked his baggage at that hotel and secured accommodations elsewhere until the following day. On the evening of the following day, he was joined by three friends from Superior, a Mr. Mortson and a Mr. and Mrs. Hansell, at the Hotel Sherman. They secured their baggage and engaged the cabman in question to take them to the railroad station. They had considerable baggage, consisting of grips, suit cases and golf bags. As

many pieces as possible were piled in beside the driver in the front part of the cab. When as many of these pieces as could be put there had been placed, the suit case in question remained. Mr. Russell put that case on the cab between the hood and the front fender on the right side. After a drive of ten or twelve minutes they reached the station and the plaintiff'' suit case was missing. Just when its absence was noted is not clear from the evidence, as will be pointed out.

The defendant was a common carrier of passengers and baggage in the City of Chicago, and liable as such, for the articles of baggage carried by it.

The plaintiff contends that the defendant is liable for the loss of the suit case and its contents, on the theory that it became dislodged from its position between the right fender and the hood of the taxicab and dropped off into the street while the cab was on its way from the hotel to the railroad station.

In support of its appeal the defendant contends, among other things, that if the suit case was lost as claimed by the plaintiff, his own negligence contributed to that loss and, therefore, he cannot recover. The only witness for the defendant was the chauffeur. At the time he testified, he was no longer in the employ of the defendant company and had not been for some time. His testimony was to the effect that there was room inside the cab for five passengers, three on the rear seat and two on movable seats which were folded up against the front of the cab when they were not in use; that with three passengers on the rear seat and one on one of the movable seats, there was ample room for the suit case in front of the other movable seat, or there was plenty of room to place it under the

many pieces as possible were piled in beside the driver in the front part of the cab. When as many of these pieces as could be put there had been placed, the suit case in question remained. Mr. Mussell put that case on the cab between the road and the front fender on the right side. After a drive of ten or twelve minutes they reached the station and the plaintiff's suit case was missing. That when its absence was noted is not clear from the evidence, as will be pointed out.

The defendant was a common carrier of passengers and baggage in the city of Chicago, and liable as such, for the articles of baggage carried by it.

The plaintiff contends that the defendant is liable for the loss of the suit case and its contents, on the theory that it became dislodged from its position between the right fender and the hood of the taxicab and dropped off into the street while the cab was on its way from the hotel to the railroad station.

In support of its appeal the defendant contends, among other things, that if the suit case was lost as claimed by the plaintiff, his own negligence contributed to that loss and, therefore, he cannot recover. The only witness for the defendant was the chauffeur. At the time he testified, he was no longer in the employ of the defendant company and had not been for some time. His testimony was to the effect that there was room inside the cab for five passengers, three on the rear seat and two on movable seats which were folded up against the front of the cab when they were not in use; that with three passengers on the rear seat and one of one of the movable seats, there was ample room for the suit case in front of the other movable seat, or there was plenty of room to place it under the

movable seats even though both of these seats were used. This testimony was not contradicted. When the plaintiff and his friends came out to take the taxicab, several of them assisted in placing the baggage in the cab. The chauffeur did not leave his seat, which was on the left hand side of the cab. Mr. Russell was the one who placed the plaintiff's suit case between the hood and the fender of the cab. There is some controversy as to what took place at that time, the chauffeur testifying that he told Mr. Russell not to put the suit case there because it was against the rules, and because it was a dangerous place to put it and he suggested that the suit case be put inside, whereupon Russell went to the door of the cab and had some conversation with those who had entered the cab. He then came back and jammed the suit case in at the place above stated and said there was no time to argue about it but to go ahead; the plaintiff, corroborated by Russell and Hentzgen, testified (the latter two by deposition) that when Russell proposed putting the suit case between the hood and the fender, he asked the chauffeur if it would be all right; that he said, "Yes, it would, that he would keep his eye on it." On cross-examination in connection with his case in chief, the plaintiff testified that after the loss of the suit case had been discovered, and a fruitless search had been made for it, he stated to one of his

novable seats even though both of these seats were used. This testimony was not contradicted. When the plaintiff and his friends came out to take the taxicab, several of them assisted in placing the baggage in the cab. The chauffeur did not leave his seat, which was on the left hand side of the cab. Mr. Russell was the one who placed the plaintiff's suit case between the hood and the fender of the cab. There is some controversy as to what took place at that time, the chauffeur testifying that he told Mr. Russell not to put the suit case there because it was against the rules, and because it was a dangerous place to put it and he suggested that the suit case be put inside. Whereupon Russell went to the door of the cab and had some conversation with those who had entered the cab. He then came back and lowered the suit case in at the place where stated and said there was no time to argue about it but to go ahead; the plaintiff, corroborated by Russell and Youngman, testified (the latter too by deposition) that when Russell proposed putting the suit case between the hood and the fender, he asked the chauffeur if it would be all right; that he said, "Yes, it would, that he would keep his eye on it." On cross-examination in connection with his case in chief, the plaintiff testified that after the loss of the suit case had been discovered and a fruitless search had been made for it, he stated to one of his

party that it was not the chauffeur's fault, "we put it there ourselves." He further testified that he did not blame the chauffeur; that he felt at the time, it was Russell's fault for putting it there; "I blamed him. I talked with Russell about it and told him it was his fault. I thought it was a dangerous place to put the suit case." The plaintiff also testified in rebuttal and at that time on cross-examination he said that he knew Russell was going to put the suit case on the fender, "I knew it was a dangerous place, but I thought he (the chauffeur) would watch it."

The chauffeur testified that his seat was on the left hand side of the cab but that he could see the suit case plainly from where he sat; that when they reached the station, the suit case was in between the hood and the fender where it had been placed; that as soon as he came to a stop, he looked back at his passengers who were preparing to get out of the cab; that a station porter had opened the door and the four passengers get out, the last one being the plaintiff, who paid the cab charges; that the baggage was unloaded from the cab by the plaintiff's two friends and two station porters; that there were twelve or fifteen pieces of baggage in all; that after the plaintiff got through paying the cab charges, the station porters and the plaintiff's friends had gone inside the station; that he then started up his cab on the way back to the hotel and that after he hadproceeded about 200 feet, he heard somone hailing him from the station and he turned around and went back and found it was the plaintiff, who told him his suit case was missing; that he assured the plaintiff the suit case was there when they arrived, and the plaintiff went back into the station and looked again and returned after five or six minutes and said he could not find it; that he then gave him a half dollar

party that it was not the conductor's fault, "we put it there ourselves." He further testified that he did not blame the conductor; that he felt at the time, it was Bussell's fault for putting it there; "I blamed him. I talked with Bussell about it and told him it was his fault. I thought it was a dangerous place to put the suit case." The plaintiff also testified in rebuttal and at that time on cross-examination he said that he knew Bussell was going to put the suit case on the fender, "I knew it was a dangerous place, but I thought he (the conductor) would watch it."

The conductor testified that his seat was on the left hand side of the car but that he could see the suit case plainly from where he sat; that when they reached the station, the suit case was in between the head and the fender where it had been placed; that as soon as he came to a stop, he looked back at his passengers who were preparing to get o - of the car; that a station porter had opened the door and the four passengers got out, the last one being the plaintiff, who told the conductor; that the baggage was unloaded from the car by the plaintiff's two friends and two station porters; that in it were twelve or fifteen pieces of baggage in all; that after the plaintiff got through paying the cab charges, the station porters and the plaintiff's friends had gone into the station; that he then started up his cab on his way back to the hotel and that after he had proceeded about six feet, he heard someone hailing him from the station and he turned around and went back and found it was the plaintiff, who told him the suit case was missing; that he assured the plaintiff the suit case was there when they arrived, and the plaintiff went back into the station and looked again and returned after five or six minutes and said he could not find it; that he then gave his full dollar

and asked him to run back with his cab and see if he could locate the suit case; that he told the plaintiff "there was no earthly use of going back. That suit case is here."; that he, nevertheless, did go back and look for it, to please the plaintiff, but that he found no trace of it. The plaintiff testified on direct examination that when he got through paying the chauffeur at the station, his friends had taken the baggage out of the cab, and when he looked for his suit case it was missing; that he asked the chauffeur where it was and he said that it must be there and he told him it was not there, whereupon, he said it must have dropped off on the way down. On cross-examination the plaintiff testified that when they reached the station, several station porters came up to help with the baggage; that they helped unload the baggage from the taxicab, assisted by Mr. Hentzgen; that there were ten or twelve articles of baggage piled up on the sidewalk; that he gave his attention to paying the chauffeur and no attention to the baggage; that he left that to the others; that the chauffeur remained in his seat while he was paying him and did nothing toward unloading the baggage. He further testified that his back was toward the others and he did not pay much attention to what they were doing; that the station porters were picking up the baggage when he turned around and they were carrying it in and that he and his friends picked up other pieces and started carrying them in; that he could not say, of his own knowledge, whether anyone took this suit case in question off the taxicab; that he did not know whether it was on the cab when they got to the station or not; that it might have been for all he knew; and it might have been taken off by a station porter or one of his friends; that he did not know what became of the suit case; that after he paid the chauf-

and asked him to run back with his cab and see if he could locate the suit case; that he told the plaintiff there was no earthly use of going back. That suit case is here.; that he, nevertheless, did go back and look for it, to please the plaintiff, but that he found no trace of it. The plaintiff testifies on direct examination that when he got through paying the chauffeur at the station, his friends had taken the baggage out of the cab, and when he looked for his suit case it was missing; that he asked the chauffeur where it was and he said that it could be there and he told him it was not there, whereupon, he said it must have dropped off on the way down. In cross-examination the plaintiff testified that when they reached the station, several station porters came up to help with the baggage; that they helped unload the baggage from the taxicab, assisted by Mr. Hodgson; that there were ten or twelve articles of baggage piled up on the sidewalk; that he gave his attention to paying the chauffeur and no attention to the baggage; that he left them in the station; that he checked his baggage in the most trifle he was paying his cab did nothing towards unloading his baggage. He further testified that he left his suit case here when he left for Boston and he did not pay much attention to what they were doing; that the station porters were piling up the baggage when he turned around and they were carrying it in and that he and his friends picked up other pieces and started carrying them too; that he could not say, of his own in charge, whether anyone took this suit case in question off the passage; that he did not keep another in sight on the cab when they got to the station or not; that it might have been for all he knew; he it might have been taken off by a station porter or one of his friends; that he did not know what became of the suit case; that after he paid the chauf-

feur, the latter turned around and started away, and that when he had proceeded a short distance, he called to him to come back and it was then he said that this suit case was lost; that at that time his friends were on their way toward the station steps. As stated above, both Hentzgen and Russell testified by deposition. Hentzgen testified in his deposition that when they arrived at the railroad station they discovered that this suit case was missing and that the chauffeur's attention was called to the fact and he said it must have dropped off on the way down. He was not asked as to just when the discovery was made. Russell testified in his deposition that when they got to the station andgot out of the taxicab, "and commenced picking up the grips and bags, the plaintiff asked where his suit case was and the chauffeur said it must be there." He further testified that he was the first one to get out of the cab and that he knew the suit case wasn't there when they got to the station because he helped take the baggage off the taxicab; that the plaintiff asked for his suit case and they looked all over forit, and for a minute everybody did not knew what to think; that they thought it must be there; that they could not see how they could lose a suit case; that they then remembered about it being on the front of the car; that the chauffeur suggested that they look around the station and see if it was there; that later he drove back and tried to locate it but could not do so.

The question of whether the plaintiff's suit case was lost by falling off the taxicab between the hotel and the railroad station, was a question of fact for the jury to determine as was also the further question covering the alleged negligence of the plaintiff. In our opinion, this court cannot say from the evidence in the record that the verdict of the

fast, the latter turned around and started away, and that when he had proceeded a short distance, he called to him to come back and it was then he said that this suit case was lost; that at that time the friends were on their way toward the station stage. As stated above, both Sanderson and Munsell testified by deposition. Sanderson testified in his deposition that when they arrived at the Ashford station they discovered that this suit case was missing and that the chauffeur's statement was called to the fact and he said it must have dropped off on the way down. No was not asked as to just when the discovery was made. Munsell testified in his deposition that when they got to the station ordered out of the taxicab, "and commenced picking up the grips and bags, the plaintiff asked where his suit case was and the chauffeur said it must be there." He further testified that he was the first one to get out of the cab and that he knew the suit case wasn't there when they got to the station because he helped take the baggage off the taxicab; that the plaintiff asked for his suit case and they looked all over first, and for a minute everybody did not know what to think; that they thought it must be there; that they could not see how they could lose a suit case; that they then remembered about it being on the front of the car; that the chauffeur suggested that they look around the station and see if it was there; that later he drove back and tried to locate it but could not do so.

The question of whether the plaintiff's suit case was lost by failing off the taxicab between the hotel and the railroad station, was a question of fact for the jury to determine as was also the further question covering the alleged negligence of the plaintiff. In our opinion, this court cannot say from the evidence in the record that the verdict of the

jury and judgment of the trial court are against the manifest weight of the evidence, on either of these questions. If the jury believed the testimony of the witnesses for the plaintiff, they may have reasonably concluded that when the taxicab arrived at the depot the suit case in question was not on it. As to the issue involving contributory negligence, the fact that the plaintiff realized, as he admitted on cross-examination, that the position in which the suit case was placed before they left the hotel was not a very safe one, would not necessarily prevent his recovery in this action. The jury may reasonably have concluded, from the testimony, that the chauffeur stated that it was all right to put the suit case there and that he would keep his eye on it, and that with such assurance as that, the plaintiff may have been justified in placing it there.

There is the further contention that the plaintiff failed to submit evidence sufficient to establish the value of the suit case and its contents. In a general way, the plaintiff testified as to what he paid for the suit case and the various articles he claimed it contained at the time it was lost, and further testified as to how long he had had the various articles and to what extent they had been used. In the absence of any other evidence we are of the opinion that this was sufficient at least to make out a prima facie case on behalf of the plaintiff as to values. 23 Corpus Juris, sections 1799, 1802; Johnson v. Canfield-Swigart Co., 292 Ill. 101; West Skokie Drainage Co. v. Dawson, 243 Ill. 175; Lanquist v. City of Chicago, 200 Ill. 69; Peoria Gas Light & Coke Co. v. Peoria Terminal R.R. Co. 146 Ill. 372; Rathbone v. Ayers, 121 App. Div. (N.Y. 355) Parmenter v. Fitzpatrick, 135 N.Y.196; Sears Roebuck

jury and judgment of the trial court in it are against the manifest weight of the evidence, on either of these questions. If the jury believed the testimony of the witnesses for the plaintiff, they may have reasonably concluded that when the taxicab arrived at the depot the well came in question was on it. As to the issue involving contributory negligence, the fact that the plaintiff testified, on the witness on cross-examination, that the position in which his foot was placed before they left the depot was not a very safe one, would not necessarily prevent his recovery in this action. The jury may reasonably have concluded, from the testimony, that the chauffeur stated that it was not right to put the suit case there and that he would keep his eye on it, and that at such assurance as that, the plaintiff may have been justified in placing it there.

There is the further contention that the plaintiff failed to submit evidence sufficient to establish the value of the suit case and its contents. In a general way, the plaintiff testified as to what he paid for the suit case and the various articles he claimed it contained at the time it was lost, and further testified as to how long he had had the various articles and to what extent they had been used. In the absence of any other evidence we are of the opinion that this was sufficient at least to make out a prima facie case on behalf of the plaintiff as to values. 22 Corpus Juris, sections 1799, 1800; Gorman v. Sheffield-Elgin Co., 4Cx 111, 101; West Whole Ice-cream Co. v. Crouch, 4A 111, 170; Lamontagne v. City of Chicago, 4Cx 171, 68; Peoria Gas Light & Coke Co. v. Peoria Terminal R.R. Co. 16C 111, 272; Hutchison v. Ayers, 1A1 App. 34, (N.Y. 355) Fairchild v. Bliss-Fisk, 15C N.Y.196; Sears Cadman

& Co. v. Mears Slayton Lumber Co., Ill. App. Court First Dist. case No. 27128, opinion filed October 18, 1922.

We find no error in the record and therefore the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

& Co. v. Hoare Sleeper Lumber Co., 111. App. Court First Dist. case No. 27129, opinion filed October 18, 1922.

We find no error in the record and therefore the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND CRAIG, JJ., CONCUR.

(26412)

177 - 27132

CENTRAL BUILDING & LOAN ASSOCIATION, a corporation, Appellee,	APPEAL FROM
v.	SUPERIOR COURT, COOK COUNTY.
JOHN GOLICH, et al on appeal of JOHN GOLICH AND MARIE GOLICH, Appellants.	

227 I.A. 594

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court:

The complainant Association filed this bill of foreclosure, covering two loans, one for $2,000.00, dated January 27, 1916, and the other for $5,000.00, dated December 5, 1916, each secured by a trust deed executed by the defendants and covering a piece of property owned by them. A reference was had to a Master who filed a report finding that the complainant had a lien on the property in question to the extent of $4,671.82, and recommending that a decree of foreclosure be entered accordingly. The decree was entered as so recommended by the Master, to reverse which the defendants have perfected this appeal and the complainant has filed cross errors.

In 1912, Golich subscribed for twenty shares of stock in the Building & Loan Association, on which he agreed to pay $20.00 per month. The stock in question would mature in September, 1918, and with all payments made it would then be worth $2,000.00. On this subscription he received pass-book No. 1169, and his account with the Association was kept in the ledger on page 1169.

177 - 2713X

CENTRAL BUILDING & LOAN ASSOCIATION, a corporation, Appellee,	
v.	APPEAL FROM
JOHN SOLICH, et al on appeal of JOHN SOLICH AND MARIE SOLICH, Appellants.	ADVERSE COUNTY, COOK COUNTY.

MR. PRESIDING JUSTICE YONKOOK delivered the opinion of the court:

The complainant association filed this bill of foreclosure, covering two loans, one for $2,000.00, dated January 27, 1916, and the other for $3,000.00, dated December 5, 1916, each secured by a trust deed executed by the defendants and covering a piece of property owned by them. A reference was had to a Master who filed a report finding that the complainant had a lien on the property in question to the extent of $4,871.32, and recommending that a decree of foreclosure be entered accordingly. The decree was entered as so recommended by the master, to reverse which the defendants have prosecuted this appeal and the complainant has filed cross errors.

In 1912, Solich subscribed for twenty shares of stock in the Building & Loan Association, on which he agreed to pay $30.00 per month. The stock in question would mature in September, 1918, and with all payments made it would then be worth $2,000.00. On this subscription he received pass-book No. 1169, and his account with the association was kept in the ledger on page 1169.

In January 1916, he purchased the property encumbered by the loans here in question and in connection with that purchase, he borrowed $2,000.00 from the Building & Loan Association. The fact that he received the money from the Association, and used it for this purpose is not controverted. The trust deed executed by the defendants to secure this loan was one of the two which are involved in this foreclosure. At the time he borrowed this $2,000.00 from the association, he subscribed for another twenty shares of the stock in the Association, agreeing to pay for them at the rate of $20.00 per month, and in connection with this subscription he received pass-book No. 1324 and his account in connection with this stock purchase was kept in the ledger of the Association on page 1324.

In the fall of 1916 the defendants improved their property and in that connection found it necessary to make another loan. There is considerable evidence about this last loan and it is in hopeless conflict.

It appears from the record that the secretary of the complainant Association was one, Krueger, and he seems to have run the Association. In the summer of 1919, it was discovered that he was short in his accounts some $13,000.00, and his connection with the Association was severed. The Association thenproceeded to liquidate. The accounts of the defendants with the Association, in connection with the two loans covered by this foreclosure, were in arrears, as shown by the books of the Association, and this foreclosure suit was instituted.

With regard to the making of the second loan in December, 1916, Golich testified that he spoke to Krueger

In January 1916, he purchased the property encumbered by the loans here in question and in connection with that purchase, he borrowed $2,000.00 from the Building & Loan Association. The last time he received the money from the Association, and used it for this purpose is not ascertained. The trust deed executed by the defendants to secure this loan was one of the two which are now lost in this litigation. At the time he borrowed this $2,000.00 from the association, he subscribed for another twenty shares of the stock in the Association, agreeing to pay for them at the rate of $30.00 per month, and in connection with this subscription he received pass-book No. 1324 and his account in connection with this stock purchase was kept in the ledger of the Association on page 1324.

In the fall of 1919 the defendants improved their property and in that connection found it necessary to make another loan. There is considerable evidence about this last loan and it is in hopelessly conflict.

It appears from the record that the secretary of the complainant Association was one, Kramer, and he seems to have run the association. In the summer of 1919, it was discovered that he was short in his accounts some $13,000.00, and his connection with the Association was severed. The prosecution thereupon proceeded to liquidate. The securities of the defendants with the Association, in connection with the 1st loans covered by this foreclosure, were in arrears, as shown by the books of the Association, and this foreclosure suit was instituted.

With regard to the making of the second loan in December, 1919, defendant testified that he spoke to Kramer

about it, saying that he wanted $3,000.00 on a second mortgage and Krueger said he would fix it; that later Krueger brought some papers to the saloon of Golich, who was a Croatian, and said he could read a little English, and Golich signed a trust deed and also an agreement with the complainant Association to purchase certain additional shares of its stock. Golich testified further that these papers were not filled out when he signed them. When introduced in evidence the trust deed recited that it was executed to secure a loan in the sum of $5,000.00, and that, as further security, the defendants had executed the agreement referred to, whereby they undertook to buy fifty shares of stock in the Association, paying therefor, at the rate of $12.50 a week. He further testified that nothing was said at the time these papers were executed, about $5,000.00, but that Krueger only said, "$2,000.00, and you want $3,000.00, that makes $5,000.00."

In connection with this second loan there was introduced in evidence a voucher or order. The trust deed and agreement above referred to were dated December 5, 1916. The order to the treasurer was dated December 7, 1916, and directed him to pay to John Golich or order, $5,000.00 for a loan on 50 shares of stock. This order was signed by the president and secretary of the Association. At the bottom of the order there was the following: "Received of the treasurer, Michael Winter, $5,000.00, in full payment of the above order", signed by the defendant and also his wife. The latter signed by her mark and that signature was witnessed by one Collins. There was also introduced in evidence the check of the complainant Association on the Kaspar State Bank, dated December 7, 1916, for the sum of $5,000.00 drawn to the order of both defendants and apparently containing their endorsements on the reverse side, that of

about it, saying that he wanted $5,000.00 on a second mortgage and Kramer said he would fix it; that later Kramer brought some papers to the saloon of Golich, who was a Croatian, and said he could read a little English, and Golich signed a trust deed and also an agreement with the complainant Association to purchase certain additional shares of its stock. Golich testified further that these papers were not filled out when he signed them. When introduced in evidence the trust deed recited that it was executed to secure a loan in the sum of $5,000.00, and that, as further security, the defendants had executed the agreement referred to, whereby they undertook to buy fifty shares of stock in the Association, paying therefor, at the rate of $12.50 a week. He further testified that nothing was said at the time these papers were executed, about $5,000.00, but that Kramer only said, "$5,000.00, and you want $5,000.00, that makes $5,000.00."

In connection with this second loan there was introduced in evidence a voucher or order. The trust deed and agreement above referred to were dated December 5, 1916. The order to the treasurer was dated December 7, 1916, and directed him to pay to John Golich or order $5,000.00 for a loan on 50 shares of stock. This order was signed by the president and secretary of the Association. At the bottom of the order there was the following: "Received of the treasurer, Michael Winter, $5,000.00, in full payment of the above order", signed by the defendant and also his wife. The latter signed by her mark and that signature was witnessed by one Collins. There was also introduced in evidence the check of the complainant Association on the Kaiser State Bank, dated December 7, 1916, for the sum of $5,000.00 drawn to the order of both defendants and apparently containing their endorsements on the reverse side, that of

Mrs. Golich being by her mark, and also the personal endorsement of William J. Krueger, the secretary of the complainant Association.

Golich testified that he never received more than $2,450.00 on this second loan; that about ten days after he signed the papers, Krueger gave him a check for $1,000.00; about a week later he received $450.00, and later on some other payments totaling all together, $2,450.00, all of which was received from Krueger, and that he didnot receive any money from anyone else on behalf of the Association. As he received the money he turned it over to the contractor on his building. He also testified that he did not know that he had signed any papers for a $5,000.00 loan, until after the Association began to liquidate, when he was apparently called upon by counsel representing the Association to pay his indebtedness.

Golich questioned his signature, as it appears at the bottom of the order for $5,000.00, and also as it appears as an endorsement on the $5,000.00 check. He admitted, on cross-examination, that at the time of this second loan he received a pass-book in connection with this stock subscription, in the Association, and that he noticed it was for fifty shares covering a $5,000.00 loan but that he thought the $5,000.00 included the first loan of $2,000.00, and that his indebtedness was only being increased by $3,000.00. He said he had never seen the check for $5,000.00 until it was shown to him by the attorney for the Association, in the office of the latter, after the Association had begun to liquidate.

Each of the two trust deeds involved in the suit at bar, contains a provision for solicitors fees in the sum of

$100.00. The decree appealed from provides for solicitors fees in the sum of $400.00, and of this the defendants complain. Complainant admits that this provision was included in the decree inadvertently and consents that the decree may be modified to the extent of providing that the solicitor's fees, to be paid by the defendants shall be in the sum of $200 instead of $400.00.

In finding that the defendants were in arrears to the extent of $4,671.82, the Master found that they owed the entire amount of the first loan, which was $2,000.00, and he further found that defendants had received only $2,450.00 on the second loan, and they, therefore, owed that amount.

In support of their appeal the defendants contend that they paid in to the complainant Association, the full value of the twenty shares of stock for which they subscribed in 1912, and that they directed Krueger, the secretary of the Association, to use that stock in the cancellation of their first loan for $2,000.00, which was made in January 1916, and that they, therefore, should be credited with that amount in this proceeding. The Master found that the account of the defendants in connection with the purchase of the twenty shares of stock for which they subscribed in 1912, was closed out in December, 1916, and that they then withdrew from the complainant Association, the value which the stock then had, which was $1321.86. The chancellor confirmed the Master in this regard, and this is claimed by the defendants to have been error.

On this point the complainant introduced a voucher or order dated December 7, 1916, (the same date as the order for $5,000.00 covering the second loan) directing the treasurer of the Association to pay to John Golich or order $1321.86,

$100.00. The decree appealed from provides for solicitors fees in the sum of $400.00, and obtains the defendants complaint. Complainant admits that this provision was included in the decree inadvertently and concedes that the decree may be modified to the extent of providing that the solicitor's fees, to be paid by the defendants shall be in the sum of $200 instead of $400.00.

In finding that the defendants were in arrears to the extent of $4,691.22, the master found that they owed the entire amount of the first loan, which was $2,000.00, and he further found that defendants had received only $2,690.00 on the second loan, and they, therefore, owed that account.

In support of their appeal the defendants contend that they paid in to the complainant Association, the full value of the twenty shares of stock for which they subscribed in 1912, and that they directed Trueger, the secretary of the Association, to use that stock in the consolidation of their first loan for $2,000.00, which was made in January 1916, and that they, therefore, should be credited with that amount in this proceeding. The Master found that the account of the defendants in connection with the purchase of the twenty shares of stock for which they subscribed in 1912, was closed out in December, 1916, and that they then withdrew from the complainant Association, the value which the stock then had, which was $1221.86. The chancellor confirmed the Master in this regard, and this is claimed by the defendants to have been error.

On this point the complainant introduced a voucher or order dated December 7, 1916, (the same date as the order for $2,000.00 covering the second loan) directing the treasurer of the Association to pay to John Dolan or order $1221.86.

"for withdrawal of twenty shares, book No. 1169". This order was signed by the president and secretary of the Association. Opposite to their signatures and to the left, there appears, written in ink, the amount "$1321.86", after which appears the following: "Received of the treasurer, Michael Winter, $_____, in full payment of the above order." This was followed by the signatures of the defendant Golich and his wife, by her mark, and the signature of P.H. Collins as a witness to that mark. The assistant to the secretary of the Association, who had been in their employ for some years, and was very familiar with all their records and accounts, testified that a search of the records failed to disclose the check covering that voucher. The original ledger sheet, page 1169, covering these twenty shares of stock for which the defendants subscribed in 1912, was introduced in evidence. This sheet indicates that the defendants made their final payment on this account on December 14, 1916, andthat the account was closed out by the payment of $1321.86 to the defendants, which appears from this ledger sheet to have been paid by check dated December 1, 1916, and this was the testimony of the assistant to the secretary. This assistant testified that she had tried to locate the cancelled check but could not find it. She further testified that from time to time the secretary would submit to the treasurer a statement covering all items received and all items paid out. There was introduced in evidence the original statement of receipts and disbursements, made up by the secretary and submitted to the treasurer, for the period from February 1, 1916, down to December 1916. Inthis statement there appears an item of disbursement under date of December 7, 1916, Voucher No. 8183, amounting to $1321.86. Voucher No. 8183 was the order to the treasurer of the Association above referred

"for withdrawal of twenty shares, book No. 1169". This order was signed by the president and secretary of the Association. Opposite to their signatures and to the left, there appears, written in ink, the amount $1321.86", after which appears the following: "Received of the treasurer, Michael Minter, $_____, in full payment of the above order." This was followed by the signatures of the defendant Dillon and his wife, by her mark, and the signature of J.R. Collins as a witness to that mark. The assistant to the secretary of the Association, who had been in their employ for some years, and was very familiar with all their records and accounts, testified that a search of the records failed to disclose the check covering that voucher. The original ledger sheet, page 1168, covering these twenty shares of stock for which the defendants subscribed in 1913, was introduced in evidence. This sheet indicates that the defendants made their final payment on this account on December 14, 1916, whether the account was closed out by the payment of $1321.86 to the defendants, which appears from this ledger sheet to have been paid by check dated December 1, 1916, and this was the testimony of the assistant to the secretary. This assistant testified that she had tried to locate the cancelled check but could not find it. She further testified that from time to time the secretary would submit to the treasurer a statement covering all items received and all items paid out. There was introduced in evidence the original statement of receipts and disbursements, made up by the secretary and submitted to the treasurer, for the period from January 1, 1916, down to December 1916. Within statement there appears an item of disbursement under date of December 7, 1916, Voucher No. 8183, amounting to $1321.86. Voucher No. 8183 was the order to the treasurer of the Association above referred

to, directing him to pay John Golich $1321.86, for the withdrawal of twenty shares of stock under pass-book No. 1169.

Golich testified that he never received $1321.86, and that he never knew that the original subscription he made for stock in the Association in 1912 had been withdrawn or discontinued; that after that subscription was made and he had negotiated his two loans from the Association, he always had three pass-books covering his three stock subscriptions, the one made in 1912 and the other two in connection with each of his two loans. The young lady who was assistant to the secretary, and who, after the connection of the latter with the Association was severed, became secretary, testified that altogether Golich had had four pass-books in connection with his stock subscriptions with the Association; that his original stock subscription made in 1912 was withdrawn and discontinued in 1916, by a payment to him of $1321.86, but that shortly thereafter he again subscribed for twenty shares of stock, and a new book was issued to him for which he received pass-book No. 1358, in connection with which he made his initial payments in April 1917. She testified that the only way that she knew the $1321.86 had been paid to defendants was from the voucher bearing their signatures, from which she had made the book entries.

In our opinion the evidence does not show that the defendants received $1321.86, from the complainant Association as claimed by it. Golich testified that he never received any such amount and that he never had any thought of withdrawing the shares of stock on which he began to pay in 1912; and that he continued to make payments on these shares until they matured. There is some documentary evidence, which, on its face, does

te, directing him to pay John Gelish $1321.56, for the withdrawal of twenty shares of stock under pass-book No. 1188.

Gelish testified that he never received $1321.56, and that he never knew that the original subscription be made for stock in the Association in 1912 had been withdrawn or discontinued; that after that subscription was made and he had negotiated his two loans from the Association, he always had three pass-books covering his three stock subscriptions, the one made in 1912 and the other two in connection with each of his two loans. The young lady who was assistant in the secretary, and who, after the connection of the latter with the Association was severed, became secretary, testified that although Gelish had four pass-books in connection with his stock subscriptions with the Association; that his original stock subscription made in 1912 was withdrawn and discontinued in 1913, by a payment to him of $1321.56, but that shortly thereafter he again subscribed for twenty shares of stock, and a new book was issued to him for which he received pass-book No. 1188, in connection with which he made his initial payments in April 1917. She testified that the only way that one knew the $1321.56 had been paid to defendants was from the voucher bearing their signatures, from which she had made the book entries.

In our opinion the evidence does not show that the defendants received $1321.56, from the complainant Association as claimed by it. Gelish testified that he never received any such amount and that he never had any thought of withdrawing the shares of stock on which he began to pay in 1912; and that he continued to make payments on these shares until they matured. There is some documentary evidence, which, on its face, does

indicate that this stock was withdrawn in December 1916. This account was the one known as No. 1169. The original ledger sheet shows that account closed out in December 1916. It is rather inconsistent, however, in indicating a final payment on December 14, 1916, by Golich, and at the same time indicating a closing out of the account by a payment of the full value of the stock under date of December 1, 1916. The account submitted by the secretary to the treasurer, also shows this corresponding item of expenditure, $1321.86, but under date of December 7, 1916. That was the day Golich was closing his negotiations with the Association for his second loan. On that date he signed a receipt and voucher for his $5,000.00 on the second loan.

There are a number of considerations, which, in our opinion, counteract and destroy such effect as the documentary evidence may be considered as having, in the way of showing that Golich received this $1321.86. These considerations are the following: First,- Krueger was an embezzler and when it was found he was short in his accounts some $13,000, it became necessary for the Association to liquidate; Second,- Although checks were produced representing the payment of $2,000.00 from the Association on the first loan and $5,000.00 on the second loan, no check was produced to show payment of the $1321.86; Third,- The voucher signed by the defendants, purporting to acknowledge receipt of this money, is in fact, in blank, reading "Received of the treasurer, Michael Winter, $_____, in full payment of the above order.": Fourth,- It seems to us to be significant that the voucher the defendants signed, by which they are claimed to have acknowledged receipt of $1321.86, is No. 8183, dated December 7, 1916, and the voucher they signed acknowledging receipt of $5,000.00

indicate that this stock was withdrawn in December 1910. This account was the one known as No. 1189. The original ledger sheet shows that account closed out in December 1910. It is rather inconsistent, however, in indicating a final payment on December 14, 1910, by Dalish, who at the same time indicating a closing out of the account by a payment of the full value of the stock under date of December 1, 1910. The account marked up the according in the treasurer, also shows this corresponding item - expenditure, which.46, but under date of December 7, 1910. Just who the lady Dalish was claiming his negotiations with the Association for the earned loan, on that date is already doubtful and further too on 10,1911 on the payment 'one.

There is a number of considerations, which, in our opinion, contradict and destroy most effect of the documentary evidence may be considered as stating, in the way of showing that Dalish received this 1.00. These considerations are the following: First,- Dalish was an adventurer and when it was found he was after [illegible] [illegible], it became necessary for the [illegible] to [illegible]; [illegible] - although people were [illegible] the [illegible] from the association on the first loan in 1910, [illegible] the [illegible], he [illegible] [illegible] [illegible] 1910; 1910.- [illegible] [illegible] [illegible], [illegible] [illegible] to [illegible] [illegible] [illegible], [illegible] [illegible] blank, reading "Received of the treasurer, [illegible] [illegible] _____, in full payment of [illegible]": Dalish.- It seems to me is to be significant that the [illegible] [illegible] same signed, by which they are claimed to have [illegible] receipts of $1,000.00, in No. 8755, dated December 7, 1910, and the number they signed [illegible] receipt of $1,000.00

on their second loan, was No. 8182, also dated December 7, 1916. In other words, the defendants signed the two vouchers at the same time. They were foreigners and apparently not familiar with financial matters. They may well have thought they were signing vouchers in duplicate or that all the papers they were signing that day had to do with the consummation of this second loan.

There is no doubt from the ledger sheet No. 1169, that it shows that account was closed out and there is no doubt from ledger sheet No. 1358, which was the new account apparently succeeding the former one, that it was opened in April 1917.

We are further of the opinion that the check was probably issued for the amount specified, and for that reason account No. 1169 was closed out, and the records of Krueger showed a disbursement of $1321.86. But, we are of the opinion, that in view of the testimony of Golich, that he never got this money; the fact that the voucher on this item, signed by the defendants, really acknowledges receipt of nothing; the fact that the check covering the items is not produced, showing their endorsement, and the fact that Krueger was an embezzler, is such testimony as to lead to the conclusion that the defendants did not get that money.

There remains to be considered the question of whether the defendants are entitled in this foreclosure proceeding, to a credit equal to the value of the stock for which they subscribed in 1912, thereby wiping out the amount of their first loan. The complainant Association contends that even if it be found that the defendant did not withdraw the surrender value of the stock, for which they subscribed in 1912, they still should not be permitted to set off that value against

on their second loan, was No. 2182, also dated December 7, 1918. In other words, the defendants signed the two vouchers at the same time. They were foreigners and apparently not familiar with financial matters. They may well have thought they were signing vouchers in duplicate or that all the papers they were signing that day had to do with the consummation of this second loan.

There is no doubt from the ledger sheet No. 1189, that it shows that account was closed out and there is no doubt from ledger sheet No. 1188, which was the new account opened by succeeding the former one, that it was opened in April 1917.

We are further of the opinion that the check was probably issued for the amount specified, and for that reason account No. 1189 was closed out, and the records of Krueger showed a disbursement of $1382.66. But, we are of the opinion, that in view of the testimony of Dolich, that he never got this money; the fact that the voucher on this item, signed by the defendants, really acknowledges receipt of nothing; the fact that the ebook covering the items is not produced, showing their endorsement, and the fact that Krueger was an embezzler, is much testimony as to lead to the conclusion that the defendants did not get that money.

There remains to be considered the question of whether the defendants are entitled in this foreclosure proceeding, to a credit equal to the value of the stock for which they subscribed in 1918, thereby wiping out the amount of their first loan. The complainant Association contends that even if it be found that the defendants did not withdraw the subscription of the stock, for which they subscribed in 1918, they still should not be permitted to set off that value against

their first mortgage indebtedness, the law being that in a foreclosure proceeding, brought on behalf of an insolvent building and loan association, against a borrowing stockholder, the latter must pay the full amount of his mortgage indebtedness and he cannot be permitted to credit any value there may be in his stock, against that indebtedness, but he must receive whatever value there may be to his stock by way of participation with all the other stockholders in such distribution as may be made after the Association has liquidated all its accounts, and paid all its debts. Wright v. Curtin, 137 Ill. App.267. On the other hand, the defendants contend that Golich continued to pay on his account No. 1169, being the stock subscription he made in 1912, beyond December 1916, when, complainants, contend, this subscription was withdrawn and closed out, and down to September 1918, when that series would naturally have matured and become worth its full face value. They, therefore, contend that Golich had the right to pay up his first loan of $2,000.00 before it matured and that such notice as might have been required from him to the Association, by the by-laws, could be waived by the secretary; and they further contend that if Golich had received the full value of his 1912 stock subscription in September 1913, which was then $2,000.00, and had turned the money over to Krueger, with directions to apply it in satisfaction of the $2,000.00 loan, and Krueger had promised to do so, but had failed to carry out his promise, equity would consider that done which ought to be done, and the result would be that the defendants would get full credit for that first loan of $2,000.00, and it would thus be eliminated, and the result would be in this proceeding, that it would be held that the complainant association did not have a lien against the defendants' property for the amount of that loan; citing Kadera v. Morava Building and Loan Association, 219 Ill. App.644.

their first mortgage indebtedness, the law being that in a foreclosure proceeding, brought on behalf of an insolvent building and loan association, against a borrowing stockholder, the latter must pay the full amount of his mortgage indebtedness and he cannot be permitted to credit any value there may be in his stock, against that indebtedness, but he must credit whatever value there may be to his stock by way of participation with all the other stockholders in such distribution as may be made after the Association has liquidated all its accounts, and paid all its debts. Wright v. Dorring, 137 Ill. App.327. On the other hand, the defendants contend that which continued to pay on his account No. 1169, being the stock subscription he made in 1912, beyond December 1916, when, complainants, contend, this subscription was withdrawn and closed out, and down to September 1918, when that series would mature and become worth its full face value. They therefore, contend that Gorich had the right to pay up his first loan of $2,000.00 before it matured and that such notice as might have been required from him to the Association, by the by-laws, could be waived by the secretary; and they further contend that if notice had received the full value of his 1912 stock subscription in September 1918, which was then $2,000.00, and had turned the money over to Kroeger, with directions to apply it in satisfaction of the $2,000.00 loan, and Kroeger had promised to do so, but had failed to carry out his promise, equity would consider that done which ought to be done, and the result would be that the defendants would get full credit for that first loan of $2,000.00, and it would then be eliminated, and the result would be in this proceeding, that it would be held that the complainant association did not have a lien against the defendants' property for the amount of that loan; citing Kobera v. Morava Building and Loan Association, 218 Ill. App.644.

The trouble with that contention is that it does not conform to the facts shown by the record in the suit at bar. Golich did testify that in December 1916, when he negotiated his second loan, he had no thought of withdrawing the value of the stock for which he had subscribed in 1912; that he did not receive $1321.86 at that time and that he never told Krueger that he wanted to draw out his money on book No. 1169, but rather, "I told Krueger I want that book to run out to strike off the first mortgage." He further testified that when he made his payments at the office of the Association in September 1918, Miss Pauch, the young woman who was the assistant to the secretary, told him that his original stock subscription had run out and that she would have to give him a new book, presumably on a new stock subscription, and that he then told her to "have Mr. Krueger straighten that first mortgage out * * * Clear up that first mortgage", and she replied that she would tell Krueger about it.

It may well be that Krueger, as the secretary of the Association, had the authority to waive such notice as the by-laws called for, in the event Golich elected to use the value of his stock in the Association and pay off that first mortgage, and it may well be, as the defendants contend, that if Golich had tendered that stock in payment of that first mortgage, at that time, and Krueger had accepted it and agreed to cancel the loan, that the defendants would now be in a position to insist that equity consider as done the thing that should then have been done and should conclude that the first mortgage had been eliminated and that, therefore, the defendants should be credited with the $2,000.00 due on that first loan. This may be true even though the ledger sheet shows that account 1169 was closed out in December 1916, because that account was succeeded by account No. 1358, which ran down to September 1918, and be-

The trouble with that contention is that it does not conform to the facts shown by the record in the suit at bar. Dolich did testify that in December 1918, when he negotiated his second loan, he had no thought of withdrawing the value of the stock for which he had subscribed in 1918; that he did not receive $1321.56 at that time and that he never told Krueger that he wanted to draw out his money on book No. 1189, but rather, "I told Krueger I want that book to run out to strike off the first mortgage." He further testified that when he made his payments at the office of the association in September 1918, Miss Hanson, the young woman who was the assistant to the secretary, told him that his original stock subscription had run out and that she would have to give him a new book, presumably on a new stock subscription, and that he then told her to "have Mr. Krueger straighten that first mortgage out * * * Clear up that first mortgage", and she replied that she would tell Krueger about it.

It may well be that Krueger, as the secretary of the Association, had the authority to waive such notice as the by-laws called for, in the event Dolich elected to use the value of his stock in the Association and pay off that first mortgage, and it may well be, as the defendants contend, that if Dolich had tendered that stock in payment of that first mortgage, at that time, and Krueger had accepted it and agreed to cancel the loan, that the defendants would now be in a position to insist that equity consider as done the thing that should then have been done and should conclude that the first mortgage had been eliminated and that, therefore, the defendants should be credited with the $2,000.00 due on that first loan. This may be true even though the ledger sheet shows that account 1189 was closed out in December 1918, because that account was succeeded by account No. 1882, which ran down to September 1919, and be-

yond, at which latter date Golich had a stock value in the Association, outside of the subscription he had made in connection with each of his loans.

There is some testimony by Miss Pauch tending to contradict that of Golich in this matter but it is not very satisfactory. However, if we take the testimony of Golich at its face value and disregard that of Miss Pauch, we will have him merely saying to the secretary in December 1916, that his intention was to use his stock subscription of 1912, at its maturity, in cancelling his first loan, and then, in September 1918, when the stock subscription of 1912 would mature, we have him requesting the young lady, acting in the capacity of a clerk or assistant, to have the secretary use the then value of the original stock subscription in cancelling the first mortgage. In our opinion that is not sufficient to place the defendants in a position now, after the Association has become insolvent and is proceeding to liquidate and suit has been instituted to foreclose their loans, to have the then value of their stock used toward the cancellation of their indebtedness. In short, assuming that Golich had, in the stock subscription he had made in 1912 (No. 1169) and the one which succeeded it (No. 1358), a value of $2,000.00, he was then in a position to liquidate his first mortgage if the Association agreed to that method of liquidation. Of course, if the stock were not used to liquidate the mortgage, Golich would have had the right, if he chose, to withdraw it and receive the $2,000.00 in money. But the complainant Association did not make such an arrangement with the defendants to pay off their mortgage and nobody on their behalf agreed to such a disposition of the mortgage. Golich merely expressed to Miss Pauch, his desire that she direct the secretary

pond, at which latter date Dolich had a stock value in the Association, details of the subscription he had made in connection with each of his loans.

There is some testimony of also much tending to contradict that of Dolich in this matter but it is not very satisfactory. However, if we take the testimony of Dolich as its face value and disregard that of Mice Pauch, we will have him merely saying to the secretary in December 1912, that his intention was to use his stock subscription [illegible] 1913, at the maturity in satisfying his first loan, and then, in September 1913, when the stock subscription of 1913 would mature, we have his representation to the same lady, nothing in the capacity of a clerk or [illegible], in case the secretary was the time value of the original stock subscription in satisfying the first mortgage. In our opinion [illegible] is not sufficient to place the defendants in a position now [illegible] the Association has become insolvent and is proceeding to liquidate and suit has been instituted to [illegible] their loans, to have [illegible] value of their stock used toward the satisfaction of their indebtedness. In short, assuming that Dolich has, in the stock subscription he had made in 1912 (No. 1158) [illegible] which amounted to (No. 1553), a value of [illegible], he was then in a position to liquidate his first mortgage if the Association [illegible] method of liquidation. If, of course, [illegible] stock were not used to liquidate the mortgage, Dolich would have had the right, [illegible] choose, to withdraw it and receive the [illegible] in money. But the complainant Association [illegible] make such an arrangement with the defendants to pay off their mortgage and nobody on their behalf agreed to such a disposition of the mortgage. Dolich merely expressed to Miss Pauch, she denies that she ever has secretary

to have that done.

Although Golich may be in a position to participate in the distribution of the assets of the Association on the basis of the stock for which he subscribed in account No. 1169, on the evidence which appears in this record, we are of the opinion that the defendants cannot have the value of that stock considered as a credit in this foreclosure proceeding, which includes the loan he made in January 1916, which was the one he says he wanted to have cancelled in September 1918.

In connection with the cross errors the complainant contends that the court erred in finding that the defendants had not received the full amount of $5,000.00 under the second loan. On that point we are of the opinion that the evidence sufficiently establishes the fact that the defendants executed the trust deed to secure a loan of $5,000.00, and an agreement covering the purchase of 50 shares of stock in the complainant Association valued at $5,000.00 and that they signed the voucher or order by which they acknowledged receipt of $5,000.00 and that they received and endorsed the check of the complainant Association for that amount.

The check for $5,000.00 was drawn on the Kaspar State Bank. The record shows that the complainant Association did not have more than a few hundred dollars in that bank in December 1916, and therefore, this check was not worth its face value at the time it was given to the defendants, In January 1917, the Association negotiated a loan at the Kaspar State Bank for $4,000.00, apparently putting up with the bank this second Golich mortgage as security. The proceeds of this loan were credited to their account in the bank and then this check was paid, the perforations in the

to have that done.

Although Dolich may be in a position to participate in the distribution of the assets of the Association on the basis of the stock for which he subscribed in account No. 1188, on the evidence which appears in this record, we are of the opinion that the defendants cannot have the value of that stock considered as a credit in this foreclosure proceeding, which includes the loan he made in January 1916, which was the one he says he wanted to have cancelled in September 1918.

In connection with the cross errors the complainant contends that the court erred in finding that the defendants had not received the full amount of $5,000.00 under the second loan. On that point we are of the opinion that the evidence sufficiently establishes the fact that the defendants executed the trust deed to secure a loan of $5,000.00, and an agreement covering the purchase of 50 shares of stock in the complainant Association valued at $4,000.00 and that they signed the voucher or order by which they acknowledged receipt of $5,000.00 and that they received and endorsed the check of the complainant Association for that amount.

The check for $5,000.00 was drawn on the Kasper State Bank. The record shows that the complainant Association did not have more than a few hundred dollars in that bank in December 1918, and therefore, this check was not worth its face value at the time it was given to the defendants. In January 1917, the Association negotiated a loan at the Kasper State Bank for $4,000.00, apparently putting up with the bank this second Dolich mortgage as security. The proceeds of this loan were credited to their account in the bank and then this check was paid, the perforations in the

check, indicating payment under date of January 16, 1917, which was the day the loan was made with the bank. As stated above, this check bears the endorsement of Krueger. Apparently, the Association not having the funds to meet this check at the time it was given to the defendants, Krueger undertook to negotiate it for them and in that way his endorsement appears on it. Between the date of the check, December 7, 1916 and the date of its payment January 16, 1917, Krueger, according to the testimony of Golich, gave the latter several of his personal checks, one being for $1,000.00 and the others for similar amounts and Golich says he used them in paying his contractor. The latter took the stand and testified to receiving these checks of Krueger's from Golich at this time. The evidence does not show that Krueger gave Golich any of his checks prior to December 7, 1916, as complainant contends.

It is the contention of the complainant that the record discloses no reason why the defendants, upon receiving the check for $5,000.00 should immediately return it to the Association, and it is argued here that when they turned the check over to Krueger they must be considered as dealing with him as their agent and not as the agent of the Association. The contention of the defendants is to the contrary.

In our opinion the record does disclose a reason for the return of the check by the defendants to Krueger as secretary of the Association, and in so doing, and in endorsing and turning the check over to him, we are of the opinion that it must be held that they were dealing with him as the agent of the Association. It is conclusively shown by the record that when this check was issued to the defendants it was worthless, for the Association did not have the funds in the bank

check, indicating payment under date of January 16, 1917, which was the day the loan was made with the bank. As stated above, this check bears the endorsement of Krueger. Apparently, the Association not having the funds to meet this check at the time it was given to the defendants, Krueger undertook to negotiate it for them and in that way his endorsement appears on it. Between the date of the check, December 7, 1916 and the date of its payment January 16, 1917, Krueger, according to the testimony of Dulich, gave the latter several of his personal checks, one being for $1,000.00 and the others for similar amounts and Dulich says he used them in paying his contractor. The latter took the money and testified to receiving these checks of Krueger's from Dulich at this time. The evidence does not show that Krueger gave Dulich any of his checks prior to December 7, 1916, on complainant's contract.

It is the contention of the complainant that the record discloses no reason why the defendants, upon receiving the check for $2,100.00 would immediately return it to the Association, and it is argued more that even they turned the check over to Krueger they must be considered as dealing with him as their agent and not as the agent of the Association. The contention of the defendants is to the contrary.

In our opinion the record does disclose a reason for the return of the check by the defendants to Krueger as secretary of the association, and is no doubt, and in endorsing and turning the check over to him, we are of the opinion that it must be held that they were dealing with him as the agent of the Association. It is conclusively shown by the record that when this check was issued to the defendants it was certainly, for the Association did not have the funds in the bank

to meet the check. Of course Krueger knew this and doubtless to avoid having the check presented to the bank by the defendants, he undertook to negotiate it for them and upon their turning their check over to him he gave them his personal checks to meet payments due from them to their contractor. It is the testimony of the defendants and not contradicted in the record, that the total of the amounts thus received by the defendants from Krueger was only $2,450.00. Of course the $5,000.00 check was ultimately presented to the bank on which it was drawn and was paid out of the funds of the Association. When it was so paid it had been endorsed by the secretary of the Association, Krueger. He doubtless got the $5,000.00 and appropriated the difference between that amount and the sum of the payments he had turned over to the defendants.

The situation presented in the suit at bar is somewhat like that presented in the case of the People v. Jasiecke, 301 Ill. 23. In that case Jasiecke was the conveyancer of a building and loan association. When a person desired to borrow money from the Association and made application for a loan, the application was submitted to the association through Jasiecke. The property which was to be the security for the loan was submitted to an appraising committee and if that committee, upon inspection of the property, approved the security, they so advised the Association and the proper officers thereupon directed Jasiecke to examine the title and if it was found good, to prepare the papers incident to the consummation of the loan. In the case at bar Krueger rendered some services representing the defendants at the time they purchased their property, in the way of examining the title and preparing the papers and he

to meet the check. Of course Krueger knew this and doubtless to avoid having the check presented to the bank by the defendants, he undertook to negotiate it for them and upon their turning their check over to him he gave them his personal checks to meet payments due from them to their creditor. It is the testimony of the defendants and not contradicted in the record, that the total of the amounts thus received by the defendants from Krueger was only $2,450.00. Of course the $5,000.00 check was ultimately presented to the bank on which it was drawn and was paid out of the funds of the Association. When it was so paid it had been endorsed by the secretary of the Association, Krueger. He doubtless got the $5,000.00 and appropriated the difference between that amount and the sum of the payments he had turned over to the defendants.

The situation presented in the suit at bar is somewhat like that presented in the case of the People v. Jaslecke, 301 Ill. 23. In that case Jaslecke was the conveyancer of a building and loan association. When a person desired to borrow money from the Association and made application for a loan, the application was submitted to the Association through Jaslecke. The property which was to be the security for the loan was submitted to an appraising committee and if that committee, upon inspection of the property, approved the security, they so advised the Association and the proper officers thereupon directed Jaslecke to examine the title and if it was found good, to prepare the paper incident to the consummation of the loan. In the case at bar Krueger rendered some services representing the defendants at the time they purchased their property, in the way of examining the title and preparing the papers and be

submitted a bill to them for these services and it was paid by them. Likewise, in the Jasiecke case, Jasiecke was paid certain fees by the applicants for the loans, for his services in examining the title and preparing the papers. Those fees generally came out of the proceeds of the loans. In that case Jasiecke, following the method described above, put through several purely fictitious loans. He also put through several of which the following is a type. One Moretz made application to the association for a loan of $1,300.00. He had just bought a piece of property on which there was a $900.00 mortgage and he desired to use the $1,300.00 in paying off that $900.00 mortgage and certain other obligations which he had. The property was appraised, the loan was approved, the proper documents executed and the association issued its check for $1,300.00 payable to the order of Moretz. The check was immediately endorsed by Moretz and returned by him to the secretary of the Association, who delivered it to the conveyancer, Jasiecke, who endorsed it and deposited it to his personal account. The check was paid in due course, Jasiecke turned over to Moretz only $195.00, and gave him a statement showing the expenditure of the remainder of the $1,300.00, one item of expenditure being the payment of the $900.00 mortgage, which, by its terms was not due for another year. Jasiecke, in fact, had not paid that mortgage but had appropriated all of the $1,300.00 except the $195.00 turned over to Moretz, to his own use. Jasiecke was indicted for embezzlement and larceny of several checks, among them the Moretz check, all of which were alleged in the indictment to be the property of the association. One of the contentions submitted in behalf of Jasiecke was that the proof showed the checks to have been the property of the payees and not the association

submitted a bill to them for these services and it was paid by them. Likewise, in the Jaslecke case, Jaslecke was paid certain fees by the applicants for the loans, for his services in examining the title and preparing the papers. These fees generally came out of the proceeds of the loans. In that case Jaslecke, following the method described above, put through several purely fictitious loans. He also put through several of which the following is a type. One Morris made application to the association for a loan of $1,300.00. He had just bought a piece of property on which there was a $900.00 mortgage and he desired to use the $1,300.00 in paying off that $900.00 mortgage and certain other obligations which he had. The property was appraised, the loan was approved, the proper documents executed and the association issued its check for $1,300.00 payable to the order of Morris. The check was immediately endorsed by Morris and returned by him to the secretary of the association, who delivered it to the conveyancer, Jaslecke, who endorsed it and deposited it to his personal account. The check was paid in due course. Jaslecke turned over to Morris only $195.00, and gave him a statement showing the expenditure of the remainder of the $1,300.00, one item of expenditure being the payment of the $900.00 mortgage, which, by its terms was not due for another year. Jaslecke, in fact, had not paid that mortgage but had appropriated all of the $1,300.00 except the $195.00 turned over to Morris, to his own use. Jaslecke was indicted for embezzlement and larceny of several checks, among them the Morris check all of which were alleged in the indictment to be the property of the association. One of the contentions submitted in behalf of Jaslecke was that the proof showed the checks to have been the property of the payees and not the association

and that in this respect there was a variance between the proof and the allegations of the indictment. The court held that the checks, including the Moretz check, were still the property of the association although they had been delivered to the payees, endorsed by them and returned to the secretary of the association. The holding in that case was based upon the fact that the checks had been returned by the payees for the purpose of insuring the association the payment of the incumbrances then on the property which it was understood were to be removed with the proceeds of the loan, so that the loan being made by the association would be a first lien. Although the situation in the suit at bar is not just that, it is in our opinion similar to it. In the suit at bar the check, after having been received by the defendants and endorsed by them, was returned to the secretary of the Association, Krueger, for the purpose of enabling the defendants to get their money. The check for $5,000.00 in the hands of the defendants was worthless. Krueger apparently undertook to negotiate it for them and gave them their money. In doing so, we are of the opinion that he was acting within the scope of his authority as the agent of the association. It is frequently the case that the business of Building and Loan associations is conducted largely by some one individual. In the Jasiecke case, supra, it was one designated as a conveyancer, who was Jasiecke. In the suit at bar it was an officer designated as the secretary, who was Krueger. It is apparent from the record that all the business which the defendants had to do with the association was done through Krueger. As far as they were concerned, he was the Association. When they applied to him for a loan what they were after was their money not a check on a bank in which there were little or no funds to the

and that in this respect there was a variance between the proof and the allegations of the indictment. The courts held that the checks, including the Morris check, were still the property of the association although they had been delivered to the payees, endorsed by them and returned to the secretary of the association. The holding in that case was based upon the fact that the checks had been returned by the payees for the purpose of insuring the association the payment of the indemnities then on the property which it was understood were to be received with the proceeds of the loan, so that the loan being made by the association would be a first lien. Although the situation in the suit at bar is not just the same, it is in our opinion similar to it. In the suit at bar the check, after having been received by the defendants and endorsed by them, was returned to the secretary of the Association, Krueger, for the purpose of enabling the defendants to get their money. The check for $8,[illegible].00 in the hands of the defendants was satisfied. Krueger especially undertook to negotiate it for them and gave them their money. In doing so, we are of the opinion that he was acting within the scope of his authority as the agent of the association. It is frequently the case that the business of building and loan associations is conducted largely by some one individual. In the Havlicek case, supra, it was one Kalmbach as a secretary, who was Havlicek. In the suit at bar it was an officer designated as the secretary, who was Krueger. It is apparent from the record that all the business which the defendants had to do with the association was done through Krueger. As far as they were concerned, he was the association. When they applied to him for a loan what they were after was their money not a check on a bank in which there were little or no funds to the

credit of the Association. And, when, having received such a check, (whether they knew of the situation at the bank was immaterial) and the secretary undertook to negotiate it forthem, he must be held to have been acting not for them but for the Association in the matter of carrying out the transaction on the part of the Association. A building and loan association which vests its secretary with the management and control of its entire business, so as to make him, in effect, a general agent, is bound by whatever he does under that broad authority. The Prairie State Loan and Building Association v. Nubling, 170 Ill. 240.

We are, therefore, of the opinion that the Master and the Chancellor were correct in finding that the complainant had a lien on the property to the extent of $2,450.00, only on the second loan.

For the reasons stated, the decree of the Superior Court is modified, by changing that part of the decree which provides for the payment of $400.00 as solicitor's fees, so as to make it provide that defendants are to pay $200.00 as solicitors' fees, and in all other respects the decree is affirmed.

DECREE MODIFIED AND AFFIRMED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

credit of the Association. And, when, having received such a check, (whether they knew of the situation at the bank was immaterial) and the secretary undertook to negotiate it forthwith, he must be held to have been acting not for them but for the Association in the matter of carrying out the transaction on the part of the Association. A building and loan association which vests its secretary with the management and control of its entire business, so as to make him, in effect, a general agent, is bound by whatever he does under that broad authority. The Atlantic State Loan and Building Association v. Mullion, 170 Ill. 240.

We are, therefore, of the opinion that the Master and the Chancellor were correct in finding that the complainant had a lien on the property to the extent of $2,450.00, only on the secured loan.

For the reasons stated, the decree of the Superior Court is modified, by changing that part of the decree which provides for the payment of $400.00 as solicitor's fees, so as to make it provide that defendants are to pay $200.00 as solicitors' fees, and in all other respects the decree is affirmed.

MOORE MODRETT AND AFFIRMED.

TAYLOR AND O'CONNOR, JJ. DISSENT.

189 - 27145

(26420)

O. W. RICHARDSON & COMPANY,
a corporation,

Appellee,

v.

CHARLES S. THOMAS, doing business
as FRANKLIN DESK CO.,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 594

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Thomas seeks to reverse a judgment entered against him in favor of the plaintiff, Richardson & Company, in the sum of $284.00. The issues were submitted to the court without a jury. The action was one of the fourth class in the Municipal Court of Chicago, for goods alleged by the plaintiff to have been sold to the defendants at their special insistence and request. No service was had on the defendant Hall and he did not appear.

The evidence shows that the defendant Thomas, doing business as the Franklin Desk Company, now and then had a call from customers for goods that he did not carry, but which were dealt in by the plaintiff. He thereupon entered into an arrangement with the plaintiff, whereby he could send such customers to them for the purchase of this line of goods. The defendant Hall was such a customer, and apparently he purchased the goods in question from the plaintiff and they were charged to the defendant Thomas, and this suit was brought to recover the amount involved in that transaction. The

O. W. RICHARDSON & COMPANY, a corporation, Appellee,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
CHARLES E. THOMAS, doing business as MANHATTAN DECK CO., Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Thomas seeks to reverse a judgment entered against him in favor of the plaintiff, Richardson & Company, in the sum of $[illegible]. The issues were submitted to the court without a jury. The action was one of the fourth class in the Municipal Court of Chicago, for goods alleged by the plaintiff to have been sold to the defendants at their special instances and request. No service was had on the defendant Hall and he did not appear.

The evidence shows that the defendant Thomas, doing business as the Manhattan Deck Company, now and then had a call from customers for goods that he did not carry, but which were dealt in by the plaintiff. He thereupon entered into an arrangement with the plaintiff, whereby he could send such customers to them for the purchase of this line of goods. The defendant Hall was such a customer, and apparently he purchased the goods in question from the plaintiff and they were charged to the defendant Thomas, and this suit was brought to recover the amount involved in that transaction. The

claim of the defendant Thomas is that he never authorized the plaintiff to charge him for the amount of this bill of goods.

In support of the appeal the defendant Thomas contends that the plaintiff failed to prove its case by a preponderance of the evidence, to the effect that authority was given to charge him for the amount of this bill, nor is it shown that the minds of the parties ever met to that effect. The issue presented, therefore, is solely one of fact.

One McCoy, an employee of the plaintiff, testified that sometime in 1918, he had a conversation with Thomas, in which the latter asked him if it would be possible for him to make an arrangement with the plaintiff whereby the latter would furnish his customers with goods in their line, which he did not carry, and charge these goods to him, giving him a special price or discount, although quoting the regular retail price to the customer. He testified he did not recall the exact words which had been used by them, but that this was the substance of the conversation. He further testified that from time to time thereafter, goods were sold in this way and charged to Thomas, and paid for by him. In connection with the arrangement made with the plaintiff by Thomas, a letter was introduced in evidence, directed to the plaintiff and signed by Thomas, dated August 27, 1918, reading as follows: "Replying to yours of August 20. Our arrangement with your Mr. McCoy, is that we are to have 10% discount from prices you quote to customers we send or take to you. Please see him in regard to this." In connection with the bill of goods in question, another letter was introduced, directed to the plaintiff and signed by the defendant Thomas, dated August 5, 1919, reading as follows: "Please show bearer, Mr. Hall, your line of rugs, quoting him

claim of the defendant Thomas is that he never authorized the plaintiff to charge him for the amount of this bill of goods.

In support of the appeal the defendant Thomas contends that the plaintiff failed to prove its case by a preponderance of the evidence, in the effect that authority was given to charge him for the amount of this bill, nor is it shown that the minds of the parties ever met to that effect. The issue presented, therefore, is solely one of fact.

One McCoy, an employee of the plaintiff, testified that sometime in 1918, he had a conversation with Thomas, in which the latter asked him if it would be possible for him to make an arrangement with the plaintiff whereby the latter would furnish his customers with goods in their line, which he did not carry, and charge these goods to him, giving him a special price or discount, although quoting the regular retail price to the customer. He testified he did not recall the exact words which had been used by them, but that this was the substance of the conversation. He further testified that from time to time thereafter, goods were sold in this way and charged to Thomas, and paid for by him. In connection with the arrangement made with the plaintiff by Thomas, a letter was introduced in evidence, directed to the plaintiff and signed by Thomas, dated August 27, 1918, reading as follows: "Replying to yours of August 26. Our arrangement with you or Mr. McCoy, is that we are to have 10% discount from prices you quote to customers we send or take to you. Please see him in regard to this."

In connection with the bill of goods in question, another letter was introduced, directed to the plaintiff and signed by the defendant Thomas, dated August 5, 1919, reading as follows: "Please show bearer, Mr. Hall, your line of rugs, quoting him

our net price and we will add our percentage for handling."

With reference to his arrangement with McCoy, the defendant Thomas testified that the plaintiff gave him a special price in some cases; that they billed the customers themselves, and sent him a 10% commission or discount, as mentioned in his letter of August 27, 1918, and in other cases they billed the goods to him, when he told them to; that whenever he sent a customer to the plaintiff and he asked the plaintiff "the amount of the prices, they would call us or we would call them and tell them whether or not to charge them to us. We never gave them any blanket authority to charge every customer we sent, by any means." He further testified that the first time he knew that this bill of goods, sold to the defendant Hall, had been charged to him was when he received the invoice for the goods some weeks after they purported to be delivered.

In rebuttal, McCoy testified that whenever Thomas felt he did not want to assume the risk of the account, the plaintiff either collected it or sold it on a cash basis, and where the plaintiff carried the account, Thomas did not receive any commission.

On this evidence, we are of the opinion that it cannot be said that the finding of the trial court was against the manifest weight of the evidence.

In the letter of August 27, 1918, which the defendant Thomas wrote the plaintiff, in apparent confirmation of the arrangement he had made with the plaintiff's agent, McCoy, he stated that this arrangement was that he was to have 10% discount from prices quoted to the customers he sent the plain-

our net price and we will add our percentage for handling."

With reference to his arrangement with McCoy, the defendant Thomas testified that the plaintiff gave him a special price in each case; that they billed the customers themselves, and sent him a 10% commission or discount, as mentioned in his letter of August 27, 1918, and in other cases they billed the goods to him, when he told them to; that whenever he sent a customer to the plaintiff and he asked the plaintiff "the amount of the prices, they would call us or we would call them and tell them whether or not to charge them to us. We never gave them any blanket authority to charge every customer we sent, by any means." He further testified that the first time he knew that this bill of goods, sold to the defendant dail, had been charged to him was when he received the invoice for the goods some weeks after they purported to be delivered.

In rebuttal, McCoy testified that whenever Thomas felt he did not want to assume the risk of the account, the plaintiff always collected it or sold it on a cash basis, and where the plaintiff carried the account, Thomas did not receive any commission.

On this evidence, we are of the opinion that it cannot be said that the finding of the trial court was against the manifest weight of the evidence.

In the letter of August 27, 1918, which the defendant Thomas wrote the plaintiff, in apparent confirmation of the arrangement he had made with the plaintiff's agent, McCoy, he stated that this arrangement was that he was to have 10% discount from prices quoted to the customers he sent the plain-

tiff. This would certainly imply that the accounts were to be charged to Thomas, who was apparently in turn to collect from his customers on the basis of the regular retail prices quoted to them by the plaintiff. That this was done from time to time in various transactions, which were had after the arrangement was made, is testified to by McCoy, and not denied. It would further seem to be clear from the letter of August 5, 1918, referring to the bill of goods sold to Hall, that the defendant Thomas was expecting to collect the amount involved, from Hall, and be charged for the goods as usual by the plaintiff, for he asks the plaintiff to quote Hall "our" (Franklin Desk Co., which was Thomas) net price; saying further, that the Franklin Desk Co. would, in turn, add their percentage of discount on the goods to be sold, as a charge for handling. Furthermore, it appears that shortly after the sale and delivery of the goods in question to Hall, Thomas received the invoice covering this transaction, from the plaintiff and it nowhere appears that he ever complained of their method of handling this transaction previous to the beginning of this suit a year and a half later, or complained that the amount of the bill was not to be charged to him as he, of course would have if such were the case.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

tiff. This would certainly imply that the accounts were to be charged to Thomas, who was apparently in turn to collect from his customers on the basis of the regular retail prices quoted to them by the plaintiff. But this was done from time to time in various transactions, which were had after the arrangement was made, in reliance to by Kelly, and not denied. It would further seem to be clear from the letter of August 3, 1919, referring to the bill of goods sold to Hall, that the defendant Thomas was expecting to collect the amount involved, from Hall, and be charged for the goods as usual by the plaintiff, for he made its possible to guide Hall "our" (Franklin Park Co., which was Thomas) not mine; saying furthermore, that the Franklin Park Co. would, in turn, add their percentage of discount on the goods to be sold, as a charge for handling. Furthermore, it appears that shortly after the sale and delivery of the goods in question to Hall, Thomas received the invoice covering this transaction, from the plaintiff and it remained as were that or ever complaining of their method of handling this transaction, previous to the beginning of this suit a year and a half later, or complaining that the amount of the bill was not to be charged to him as he, of course would have if such were the case.

We find no error in the record and, therefore, the judgment of the municipal court is affirmed.

DUNNIGAN, J., AFFIRMED.

TAYLOR AND CLEMENS, JJ., CONCUR.

2643

215 - 27172

VASILY LILLOSH,

Appellee,

v.

VLADIMIR BRASLAWSKY, ET AL doing business as RUSSIAN-AMERICAN BUREAU, et al on appeal of RUSSIAN-AMERICAN BUREAU, a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 594

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Russian-American Bureau seeks to reverse a judgment for $94.00, recovered by the plaintiff in the Municipal Court of Chicago.

In his statement of claim the plaintiff alleges that his claim is for the sum of $80.00, money had and received by the defendant from the plaintiff on September 30, 1917, which the defendant agreed to pay, as per statement and receipt of that date, together with $14.00 interest. The plaintiff has filed no appearance in this court.

The evidence shows that on the date in question the plaintiff paid $80.00 to the defendant for the purpose of having this amount forwarded, in rubles, to his wife at some point in Russia. At the time of this payment, the defendant gave the plaintiff a receipt acknowledging receipt of the $80.00 from him for 440 rubles, to be remitted to his wife at an address designated in the receipt. On the bottom of the receipt there appears the following: "This remittance will be forwarded to the payee named, as per instruction of

218 - 2V1V2

VASILY LILIOKH,

Appellee,

v.

VLADIMIR MARGELAVICKY, ET AL doing business as RUSSIAN-AMERICAN BUREAU, et al on appeal of RUSSIAN-AMERICAN BUREAU, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

22V I.A. 394

MR. PRESIDING JUSTICE THEMIS delivered the opinion of the court.

By this appeal the defendant, Russian-American Bureau sought to reverse a judgment for $94.00, recovered by the plaintiff in the municipal court of Chicago.

In his statement of claim the plaintiff alleges that his claim is for the sum of $80.00, money had and received by the defendant from the plaintiff on September 30, 1917, which the defendant agreed to pay, as per statement and receipt of that date, together with $14.00 interest. The plaintiff has filed no appearance in this court.

The evidence shows that on the date in question the plaintiff paid $80.00 to the defendant for the purpose of buying this amount forwarded, in rubles, to a city at some point in Russia. At the time of this payment, the defendant gave the plaintiff a receipt acknowledging receipt of the $80.00 from him for 460 rubles, to be remitted to his wife at an address designated in the receipt. On the bottom of the receipt there appears the following: "This remittance will be forwarded to the party named, as per instruction of

the remitter, and subject to the rules and regulations of the post offices used in making the remittance. "The plaintiff testified that his wife never got the money. The only witness for the defendant was a young woman who had been employed in the capacity of clerk in its office for some fifteen years. She testified, in effect, that the remittance in question had been forwarded in the usual course of business, through the Russian-American Line, together with a number of other remittances that were to be forwarded at that time to Russia. She identified, and there was introduced in evidence, the original receipt signed by the Russian-American Line, and given for this remittance, to the defendant, and a communication from the Russian-American Line to the defendant, acknowledging receipt of its check for $998.73, covering a number of money order remittances, including the one in question. There was also introduced the original check referred to in the above communication, showing its endorsement by the Russian-American Line and indicating its payment through the Chicago clearing House, October 17, 1917. This witness further testified that in January, 1918, the defendant received a receipt, indicating that the money in question had been turned over to the post office in Petrograd, Russia, by the Russian-American Line. Third document was in the Russian language but the witness apparently interpreted that part of it having to do with this remittance, saying that it referred to the remittance by number, giving the name "M. A. Lillesh" as the one to whom it was to be paid, and the place at which the payment was to be made to her, and the amount, 440 rubles. She further testified that this receipt bore the official stamp "Petrograd Post Office" which was the same stamp that had appeared on hundreds of other similar documents that defendant had received from time to time in the past, on similar remittances.

the remitter, and subject to the rules and regulations of the post offices used in making the remittance. "The plaintiff testified that his wife never got the money. The only witness for the defendant was a young woman who had been employed in the capacity of clerk in the office for some fifteen years. She testified, in effect, that the remittance in question had been forwarded in the usual course of business, through the Russian-American Line, together with a number of other remittances that were to be forwarded at that time to Russia. She identified, and there was introduced in evidence, the original receipt signed by the Russian-American Line, and given for this remittance, to the defendant, and a communication from the Russian-American Line to the defendant, acknowledging receipt of its check for $998.78, covering a number of money order remittances, including the one in question. There was also introduced the original check referred to in the above communication, showing its endorsement by the Russian-American Line and indicating its payment through the Chicago clearing House, October 17, 1917. This witness further testified that in January, 1918, the defendant received a receipt, indicating that the money in question had been turned over to the post office in Petrograd, Russia, by the Russian-American Line. This document was in the Russian language but the witness apparently interpreted that part of it having to do with this remittance, saying that it referred to the remittance by number, giving the name "A. Lilioen" as the one to whom it was to be paid, and the place at which the payment was to be made in her, and the amount, 440 rubles. She further testified that this receipt bore the official stamp "Petrograd Post Office" which was the same stamp that had appeared on hundreds of other similar documents that defendant had received from time to time in the past, on similar remittances.

The issues were presented to the trial court without a jury and the court entered judgment against the defendant for the amount of the plaintiff's claim; apparently, from his remarks, made at the close of the hearing, on the theory that while conditions in Russia had been such as to prevent this remittance reaching the payee, the conditions were known by the defendant atthe time it transmitted the money, but, notwithstanding that fact, it had undertaken to do so. The record contains no competent evidence as to whether the conditions in Russia were such as to prevent this remittance reaching the payee, nor that the defendant was aware of any such situation. Furthermore, there is no proof in the record that there was any undertaking on the part of the defendant to deliver or pay this money to the plaintiff's wife. As shown by the terms of the receipt delivered to the plaintiff at the time he paid his money, the only undertaking of the defendant was to forward it as instructed by the plaintiff, such forwarding to be subject to the rules and regulations of the post office used in making the remittance. This indicated clearly that it was in the contemplation of the parties that use was to be made of the post offices in accomplishing this remittance. The evidence submitted in behalf of the defendant, indicates that the amount in question was forwarded by the defendant through the Russian-American Line to the postal authorities at Petrograd, and was received by them there.

Assuming it to have been proven by competent evidence that the plaintiff's wife never received the money in question, the evidence fails to establish the liability of the defendant. It accepted the plaintiff's money and agreed with him to forward it, such forwarding to be according to the terms set forth in the receipt given to the plaintiff, through post office channels. The evidence indicating that the money reached the postal authorities

The issues were presented to the trial court without a jury and the court entered judgment against the defendant for the amount of the plaintiff's claim; apparently, from his remarks, made at the close of the hearing, on the theory that while conditions in Russia had been such as to prevent this remittance taking the payee, the conditions were known by the defendant at the time it transmitted the money, but, notwithstanding that fact, it had undertaken to do so. The record contains no competent evidence as to whether the conditions in Russia were such as to prevent this remittance reaching the payee, nor what the defense of war was of any such situation. Furthermore, there is no proof in the record that there was any undertaking on the part of the defendant to deliver or pay this money to the plaintiff's wife. As shown by the terms of the receipt delivered to the plaintiff at the time he paid his money, the only undertaking of the defendant was to forward it as instructed by the plaintiff, such forwarding to be subject to the rules and regulations of the post office used in making the remittance. This indicated clearly that it was the contemplation of the parties that use was to be made of the post offices in accomplishing the remittance. The evidence submitted in behalf of the defendant, indicates that the sum in question was forwarded by the defendant the usual Postal-Money Order to the postal authorities at Petrograd, and was received by them there.

Assuming it has been proven by competent evidence that the plaintiff's wife never received the money in question, the evidence fails to establish the liability of the defendant. It accepted the plaintiff's money and issued its receipt for it, such transaction to be according to the terms set forth in the receipt given to the plaintiff, through post office channels. The evidence indicating that the money reached the postal authorities

in Russia, the defendant cannot be held liable, assuming that for some reason, not disclosed in the record, this remittance thereafter vanished or at least never came into the hands of the plaintiff's wife.

The plaintiff having failed to establish any basis of liability on the part of the defendant, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

in Russia, the defendant cannot be held liable, assuming that for some reason, not disclosed in the record, this remittance thereafter required or at least never came into the hands of the plaintiff's wife.

The plaintiff having failed to establish any basis of liability on the part of the defendant, the judgment of the Municipal Court is reversed.

MICHAEL HEMMERDEY.

TAYLOR AND O'CONNOR, JJ. CONCUR.

224 - 27181

R. P. JONES,
Appellee,

v.

NELS NELSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 595

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of forcible entry and detainer brought in the Municipal Court of Chicago, by the plaintiff Jones against the defendant Nelson. After a hearing the court found the issues for the plaintiff and gave judgment in his favor for possession of the premises involved, to reverse which, the defendant has perfected this appeal.

The defendant was in possession of the premises in question, an apartment, by virtue of a lease in which the plaintiff was the lessor and the defendant the lessee, said lease covering a term expiring April 30, 1921, and providing that the term was to continue from year to year thereafter, unless it should be terminated on the date above mentioned, or any like date in any subsequent year "by the giving by either party to the other of not less than sixty days notice in writing of such termination."

On the trial, the plaintiff submitted evidence to the effect that he addressed a notice in writing to the defendant under date of February 18, 1921, notifying him that his lease

H. P. JONES,
Appellee,

v.

MRS. KIRSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE SCANLAN delivered the opinion of the court.

This was an action of forcible entry and detainer brought in the Municipal Court of Chicago, by the plaintiff Jones against the defendant Kirson. After a hearing the court found the issues for the plaintiff and gave judgment in his favor for possession of the premises involved, to reverse which, the defendant has prosecuted this appeal.

The defendant was in possession of the premises in question, an apartment, by virtue of a lease in which the plaintiff was the lessor and the defendant the lessee, said lease covering a term expiring April 30, 1921, and providing that the term was to continue from year to year thereafter, unless it should be terminated on the date above mentioned, or any like date in any subsequent year "by the giving by either party to the other of not less than sixty days notice in writing of such termination."

On the trial, the plaintiff submitted evidence to the effect that he addressed a notice in writing to the defendant under date of February 16, 1921, notifying him that the lease

covering the apartment in question would terminate on April 30, 1921, and requesting the defendant to deliver up possession of the premises on that date. The notice was signed by the plaintiff as landlord. There was no objection offered to the introduction of this notice in evidence, nor any denial of the receipt of the notice by the defendant. Upon the expiration of the term, on April 30, 1921, the defendant refused to deliver up possession of the premises, whereupon, the plaintiff instituted these proceedings.

It was shown by the record and the supplemental record filed in this court, that in the trial court the defendant took the position that the lease in question had become cancelled by the notice mentioned above, and that inasmuch as the tenancy had been terminated, suit for possession could be maintained only under the fourth clause of Section 2 of the Statute on Forcible Entry and Detainer. In proceeding on that theory, the defendant called the plaintiff to the stand and endeavored to show that the title of the property in question was not in the plaintiff alone, but in the plaintiff and his wife. The court then ruled that the defendant was not in a position to question his landlord's title, and proceeded to enter a finding and judgment as above noted.

In his brief filed in this court, the sole point argued by the defendant in support of his appeal, is to the effect that the evidence fails to show that the notice provided for in the lease was served upon the defendant sixty days prior to April 30, 1921, or at any other time.

In contending in the trial court that the notice operated to terminate the tenancy, the defendant must be held to have con-

covering the apartment in question would terminate on April 30, 1921, and requesting the defendant to deliver up possession of the premises on that date. The notice was signed by the plaintiff as landlord. There was no objection offered to the introduction of this notice in evidence, nor any denial of the receipt of the notice by the defendant. Upon the expiration of the term, on April 30, 1921, the defendant refused to deliver up possession of the premises, whereupon, the plaintiff instituted these proceedings.

It was shown by the record and the supplemental record filed in this court, that in the trial court the defendant took the position that the lease in question had become cancelled by the notice mentioned above, and that inasmuch as the tenancy had been terminated, suit for possession could be maintained only under the fourth clause of Section 2 of the Statute on Forcible Entry and Detainer. In proceeding on that theory, the defendant called the plaintiff to the stand and endeavored to show that the title of the property in question was not in the plaintiff alone, but in the plaintiff and his wife. The court then ruled that the defendant was not in a position to question his landlord's title, and proceeded to enter a finding and judgment as above noted.

In his brief filed in this court, the sole point argued by the defendant in support of his appeal is the effect that the evidence fails to show that the notice provided for in the lease was served upon the defendant sixty days prior to April 30, 1921, or at any other time.

In contending in the trial court that the notice operated to terminate the tenancy, the defendant must be held to have con-

ceded the proper serving of the notice upon him. Thomasson v. Wilson, 146 Ill. 384. It has been held repeatedly that an appellant in this court cannot take a position in prosecuting his appeal, inconsistent with that taken by him in the trial court.

The proceedings in the trial court involving the contention of counsel for the defendant to the effect that "the lease was cancelled by giving them notice of cancellation" were not included in the original bill of exceptions and do not appear in the original transcript of record filed in this court. After the defendant had taken the position disclosed in his brief, as filed in this court, the plaintiff moved the trial court to amend the bill of exceptions by showing the contention made by the defendant in that court, with reference to the notice, and that the motion to amend the bill of exceptions was denied by the trial court. These latter proceedings were incorporated in an additional transcript of the record, which, on motion of the plaintiff, was duly filed in this court. Subsequently the parties to this appeal entered into a stipulation, providing that in all the proceedings in this court the transcript of the record should be taken and considered as consisting of both the original and additional transcripts of record and that the bill of exceptions, as contained in the original transcript should be treated and considered as amended so as to include the subject-matter contained in the additional transcript. That the plaintiff was entitled to possession of the premises in question is abundantly established by the record. It seems equally clear, from the proceedings involved in the case, to which we have referred, that the defendant prosecuted his appeal solely for delay.

For the reasons stated, the judgment of the Municipal

ended the proper serving of the notice upon him. Thompson v. Wilson, 146 Ill. 324. It has been held repeatedly that an appellant in this court cannot take a position in prosecuting his appeal, inconsistent with that taken by him in the trial court.

The proceedings in the trial court involving the consideration of counsel for the defendant to the effect that "the issues was compelled by giving them notice of cancellation" were not included in the original bill of exceptions and do not appear in the original transcript of record filed in this court. After the defendant had taken the position disclosed in his brief, as filed in this court, the plaintiff moves the trial court to amend the bill of exceptions by showing the consideration made by the defendant in that court, with reference to the notice, and that the motion to amend the bill of exceptions was denied by the trial court. These latter proceedings were incorporated in an additional transcript of the record, which, on motion of the plaintiff, was duly filed in this court. Subsequently the position in this appeal entered into a stipulation, providing that in all the proceedings in this court the transcript of the record should be taken and considered as containing of both the original and additional transcripts of record and that the bill of exceptions, as contained in the original transcript should be treated and considered as amended so as to include the subject-matter contained in the additional transcript. That the plaintiff was entitled to possession of the premises in question is abundantly established by the record. It seems equally clear, from the proceedings involved in the case, to which we have referred, that the defendant presented his appeal solely for delay.

For the reasons stated, the judgment of the municipal

Court is affirmed, and the cost of preparing and filing the additional transcript of the record and the additional abstract of the record in this court, are taxed as costs against the defendant.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Court is affirmed, and the cost of preparing and filing the additional transcript of the record and the additional abstract of the record in this court, are taxed as costs against the defendant.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

225 - 27182

R. F. JONES,
Appellee,

v.

N. NELSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 595

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for possession, recovered by the plaintiff in a proceeding in forcible entry and detainer in the Municipal Court of Chicago.

The issues and all the points involved in this case are identical with those involved in Case No. 27181, in which we are this day filing an opinion. The leases in the two cases covered different apartments in the same building.

For the reasons stated in the opinion referred to, the judgment in the case at bar is affirmed and the costs of preparing and filing the additional transcript of the record and the additional abstract of the record in this court, are taxed against the defendant.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

No. 27183

R. D. JONES,
Appellee,

v.

E. NELSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

27183

MR. PRESIDING JUSTICE VONNEMAN delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for possession, recovered by the plaintiff in a proceeding in forcible entry and detainer in the Municipal Court of Chicago.

The issues and all the points involved in this case are identical with those involved in Case No. 27181, in which we are this day filing an opinion. The issues in the two cases covered different apartments in the same building.

For the reasons stated in the opinion referred to, the judgment in the case at bar is affirmed and the costs of preparing and filing the additional transcript of the record and the additional abstract of the record in this court, are taxed against the defendant.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ., CONCUR.

226 - 27183

R. P. JONES,
Appellee,

v.

KELLY GOLDBLOSS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 595

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for possession, recovered by the plaintiff in a proceeding in forcible entry and detainer in the Municipal Court of Chicago.

The issues and all the points involved in this case are identical with those involved in Case No. 27181, in which we are this day filing an opinion. The leases in the two cases covered different apartments in the same building.

For the reasons stated in the opinion referred to, the judgment in the case at bar is affirmed and the costs of preparing and filing the additional transcript of the record and the additional abstract of the record in this court, are taxed against the defendant.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

No. 8715.

R. P. JONES,

Appellee.

v.

KITTY GOLDBERG,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

AFFIRMED.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for possession, recovered by the plaintiff in a proceeding in forcible entry and detainer in the Municipal Court of Chicago.

The issues and all the points involved in this case are identical with those involved in Case No. 8718, in which we are this day filing an opinion. The leases in the two cases covered different apartments in the same building.

For the reasons stated in the opinion referred to, the judgment in the case at bar is affirmed and the costs of preparing and filing the additional abstract of the record and the additional abstract of the record in this court, are taxed against the defendant.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ., CONCUR.

27120

165 - 27120

A. ROTH, doing business as Publisher's Press,

Appellee,

v.

GEORGE BLUMENSTOCK, individually, doing business as the Blumenstock Advertising Service Co.,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 595[4]

MR. JUSTICE O'CONNOR delivered the opinion of the court.

A. Roth, doing business as the Publisher's Press, brought suit against G. Blumenstock, doing business as the Blumenstock Advertising Service Co., to recover for printing done for the defendant. There was a verdict and judgment in plaintiff's favor for $574.21, to reverse which defendant prosecutes this appeal.

So far as it is material to state the facts, they are as follows: plaintiff, who was in the printing business entered into an agreement with defendant whereby plaintiff was to print 1000 year books of the Lake Michigan Yachting Association. A large part of the printed matter of the books wasthe same as had appeared in previous editions and for this the defendant was to furnish the plaintiff the necessary type and plates. The evidence tends to show that the work was to be completed and the books delivered by July 1, 1920. The work was not completed until a month or six weeks later. The plaintiff's contention is that the reason for the delay was the failure of the defendant to furnish promptly the type and plates that he was to provide. The defendant denies

[illegible]

A. KUHN, doing business
as Publisher's Press,

Appellee,

v.

GEORGE [illegible], individually,
doing business as the Stinnestock
Advertising Service Co.,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

[illegible] I.A. [illegible]

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

A. Kuhn, doing business as the Publisher's Press, brought suit against G. Stinnestock, doing business as the Stinnestock Advertising Service Co., to recover for printing done for the defendant. There was a verdict and judgment in plaintiff's favor for [illegible], to reverse which defendant prosecutes this appeal.

So far as it is material to state the facts, they are as follows: plaintiff, who was in the printing business entered into an agreement with defendant by which plaintiff was to print [illegible] of the [illegible] Publishing Association. [illegible] of the [illegible] books [illegible] This the defendant was to furnish the plaintiff [illegible] type and plates. The evidence tends to show [illegible] was to be completed [illegible] the books delivered by [illegible]. The work was not completed until a month or six weeks later. The plaintiff's contention is that the reason for the delay was the failure of the defendant to furnish in time the type and plates that he was to furnish. The [illegible]

that there was any such delay. Defendant's position, as we understand it, is that the books were never delivered or tendered to him by the plaintiff and, therefore, he was not required to pay for them. On the other hand, the plaintiff contends that he tendered the books to the defendant but that the latter refused to accept or pay for them.

The evidence tends to show that on or about August 5, 1920, plaintiff had telephone conversation with the defendant requesting some payment on account and advising the defendant that the books were completed; that it was then agreed that the defendant would pay $275.00 and that plaintiff would deliver 500 of the books for that amount. Thereupon plaintiff took 500 of the books to defendant's place of business, and sent his messenger boy up to defendant's office with the bill requesting payment of the bill before the books would be surrendered. Defendant refused to pay the bill and stated that he would not take the books. Thereupon the plaintiff took the books back to his shop. The balance of the books were never tendered, and we think any further tender was unnecessary under the circumstances. Later on, by stipulation entered into between the parties, it was agreed that the books be delivered to the Lake Michigan Yachting Association without prejudice to the rights of the parties. The books were accordingly delivered. It appears further from the evidence that the defendant was to have the books printed and deliver them to the yachting association without charge, for which he was to have the privilege of securing whatever advertising he could to be printed in the book and retain the proceeds.

Evidence offered on behalf of the defendant tends to show that about July 1, 1920, he called the plaintiff on the telephone and inquired if the books were ready, and that

that there was any such delay. Defendant's contention, as we understand it, is that the books were never delivered or tendered to him by the plaintiff and, therefore, he was not required to pay for them. On the other hand, the plaintiff contended that he delivered the books to the defendant but that the latter refused to accept or pay for them.

The evidence shows it was that on or about August 8, 1920, plaintiff's representative conversation with the defendant respecting some payment on account and advising the defendant that the books were now ready; that in the course of that the defendant said he thought he had paid plaintiff enough to cover all the books he had received so far. The agent plaintiff was sent to the house to deliver a copy of the bill, and when he presented the bill defendant refused to pay the bill or receive the books, saying he would not take the books. The agent of the plaintiff took the books back to his store. The testimony of the plaintiff's witnesses, further tendered, go to show that the defendant was dissatisfied under the circumstances. Later on, by stipulation entered into between the parties, it was agreed that the matter be delivered to the Hon. Joseph Jackson, referee, with instructions to report to the judge of the court. The books were accordingly delivered. It appears further in the stipulation that the defendant was to have the books examined and a report made by reading and letting without a jury, and he was to have the privilege of adducing testimony in support of his position as to the books and to be heard in the court on certain the evidence.

Evidence of what he should do with the books if he should be adjudged to have that above duty is. Item, ... related the plaintiff's the telephone and inquired if the books were ready, and said

he was informed that they were not on account of plaintiff's inability to procure certain paper and material; that several times thereafter he called and made the same inquiry; that about the first week in August plaintiff called the defendant and requested the payment of $300.00 on account and stated that the books were finished; that shortly thereafter defendant called at plaintiff's place of business and found that they were not finished. Defendant further testified that he did not refuse to accept the books and that he was not in his place of business when plaintiff and his messenger boy called there to deliver the books.

Defendant contends that the finding of the jury is against the manifest weight of the evidence. We think the evidence above set forth and other evidence in the record warranted the jury in finding as they did for the plaintiff, and in these circumstances, of course, we are not at liberty under the law to disturb the verdict.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

he was informed that they were not on account of plaintiff's inability to procure durable paper and material; that several times thereafter he called and made the same inquiry; that about the first week in August plaintiff called the defendant and requested the payment of $300.00 on account and stated that the books were finished; that shortly thereafter defendant called at plaintiff's place of business and found that they were not finished. Defendant further testified that he did not refuse to accept the books and that he was not in his place of business when plaintiff was at a messenger boy called there to deliver the books.

Defendant contends that the finding of the jury in against the weight and of the evidence. In weighing the evidence there are four other witnesses in the record mentioned the jury in finding on the [illegible] plaintiff, and in some circumstances, of course, we are not at liberty under the law to disturb the verdict.

The judgment of the [illegible] court of [illegible] is affirmed.

[illegible].

THOMAS, P.J. and [illegible], J. J. concur.

193 - 27149

JOHN MILTON OLIVER,

Appellee,

v.

DOLLIE F. LEITCH and
OLIVE LEITCH,

Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 595

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendants to recover the balance due on a promissory note for $2432.68 dated March 16, 1917, payable to Harry S. Mccartney on or before six months after date with interest at the rate of 6% per annum, on which note $1,000.00 was paid September 26, 1917. Defendants were the makers of the note. Plaintiff claims the note as assignee for value before maturity. To plaintiff's amended statement of claim the defendants filed an amended affidavit of merits, which, on motion of plaintiff, was stricken from the files. Defendants thereupon elected to stand by their amended affidavit of merits and they were defaulted. Judgment was entered in favor of the plaintiff for the amount due on the note, together with interest thereon, amounting to $1812.93, to reverse which defendants prosecute this appeal.

Plaintiff's amended statement of claim set up the execution and delivery of the note by the defendants; that they had paid $1,000.00 on account of plaintiff, who was the owner of the note, having received the same before maturity from the payee thereof, Harry S. Mccartney. The amended statement of

JOHN MILTON GLIVAN,

Appellee,

v.

MERLE F. DEVOUX and
ELIAS LEWIN,

Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE CHADWICK delivered the opinion of the court.

Plaintiff brought suit against defendants to recover the balance due on a promissory note for $1853.00 dated March 16, 1917, payable to Harry S. Mayerhoff or at before six months after date with interest at the rate of 6% per annum, on which note $1,000.00 was paid September 26, 1917. Defendants were the makers of the note. Plaintiff claims the note as consideration for value before maturity. To plaintiff's amended statement of claim the defendants filed an amended affidavit of merits, which, on motion of plaintiff, was stricken from the files. Defendants in proper already to answer to their amended affidavit of merits was long was allowed. Judgment was entered in favor of the plaintiff for the amount due on the note, together with interest thereon, amounting to $1814.74, to reverse which defendants prosecute this appeal.

Plaintiff's amended statement of claim set up the execution and delivery of the note by the defendants; that they had paid $1,000.00 on account of plaintiff, who was the owner of the note, having received the same before maturity from the payee thereof, Harry S. Mayerhoff. The amended statement of

claim further set up the employment by the defendants of Mecartney to represent them in a certain condemnation proceeding pending in the Circuit Court of Cook County; that in that matter there was $5500.00 belonging to defendants deposited with the Clerk of the Circuit Court and that Mecartney had filed a petition claiming a lien on that fund for his fees; that the defendants here answered the petition and that after the hearing of that matter by the Circuit Court, that court entered judgment which found that the defendants had paid Mecartney on account of services rendered $4569.06, of which $2136.38 was cash and the balance, $2432.68, was evidenced by the note in suit here. In that case the Circuit Court found that Mecartney was entitled to $7,000.00 attorney's fees, and he was given a lien for $2430.94 on the $5500.00 deposited with the clerk of the court.

The defense set up in the amended affidavit of merits was that when Mecartney was employed by the defendants here to represent them in the condemnation suit he was paid a retainer of $300.00, and that he agreed to await the outcome of the suit for the balance of his fees which were to be reasonable; that before the condemnation suit was completed he demanded further fees on account of services rendered, and stated in substance that if he was not paid some additional fees he would withdraw from the condemnation case, and in these circumstances the note in question was given to Mecartney on account of services; that they had been overreached in the matter. It was further set up as a defense that there was no consideration for the note and that a fee of $10,000.00 had been paid by the railroad company, which was seeking to condemn defendants' property in the Circuit Court proceeding, to the defendants for attorney's fees in that case; that the same was deposited by the railroad com-

claim further set up the assignment by the defendants of Secretary to repayment thus in a certain condemnation proceeding pending in the Circuit Court of Cook County; that in that matter there was $[illegible] belonging to defendants deposited with the Clerk of the Circuit Court and that Secretary had filed a petition alleging a lien on that fund for his fees; that the defendants then answered the petition and that after the hearing of that matter by the Circuit Court, that court entered judgment which fixed the defendants and said Secretary on account of services rendered $[illegible], of which $[illegible] was paid and the balance, $[illegible], was evidenced by the note in suit here. In that case the Circuit Court found that Secretary was entitled to $[illegible] reasonably, and he was given a lien for $[illegible] on the $[illegible] deposited with the Clerk of the Court.

The defense set up in the amended affidavit of merits was that when Secretary was employed by the defendants here in connection thus in the condemnation [illegible] a retainer of $[illegible], and that it agreed in writing the outcome of the suit for the balance of his fees which was to be reasonable; that before the condemnation suit was completed he demanded further fees on account of services rendered, and claims in abatement that, if he was not paid the additional fees he would be unable from the condemnation suit, and in turn eliminating the [illegible] in question [illegible] Secretary on account of services that they had rendered in the matter. It was further set up in a defense that there was no consideration for the note in that a fee of $[illegible] was then paid by the railroad company, and it was needing to condemn defendants' property in the Circuit Court proceeding. In the affidavits for attorney's fees in that case, that the same was dependent on the railroad company

pany with the clerk of the Circuit Court. The affidavit further set up that the plaintiff was not a bona fide owner of the note, but that he was cognizant of all the facts, he being a partner of Mecartney. Other matters are stated, which we think it is unnecessary to mention here, as they in no way effect the decision of the case.

Plaintiff contends that the judgment must be affirmed because there is no bill of exceptions in the record showing the motion to strike defendants' amended affidavit of merits from the files, nor the reason of the court for sustaining that motion, and in support of this the case of Harmon v. Gallahan, 207 Ill. App. 506, and other cases, are cited. That case was reversed by the Supreme Court of this State and is reported in 286 Ill. 59. The order of the court in striking the affidavit of merits shows that the defendant elected to stand by its affidavit, and thereupon, and as part of the same order, the Municipal Court defaulted the defendants for want of an affidavit of merits and entered judgment in favor of plaintiff on his statement of claim. And the argument in plaintiff's brief clearly shows beyond question that the reason for the court striking the affidavit of merits from the files was that it stated no legal defense. In other words, the court treated the motion as a demurrer, and in these circumstances, of course, no bill of exceptions was necessary. Harmon v. Gallahan, 286 Ill. 59.

The defendants argue that the judgment of the Circuit Court establishing Mecartney's lien on the $5500.00 deposited with the clerk of that court was appealed from by them and that the matter was pending in this court. Since the briefs in the instant case were filed here we have decided that case

pany with the clerk of the District Court. The affidavit further set up that the plaintiff was not a bona fide owner of the note, but that he was cognizant of all the facts, he being a partner of Moorhouse. Other matters are stated, which we think it is unnecessary to mention here, as they in no way affect the decision of the case.

Plaintiff contends that the judgment must be affirmed because there is no bill of exceptions in the record showing the motion to strike defendants' amended affidavit of merits from the files, nor the ruling of the court for sustaining that motion, and in support of this the case of Harmon v. Gallagher, 27 Ill. App. 308, and other cases, are cited. That case was reversed by the supreme court of Illinois and is reported in 88 Ill. 89. The order of the court in striking the affidavit of merits shows that the defendant elected to plead by its affidavit, and thereupon, and as part of the same order, he sustained "motion striking the defendants for want of an affidavit of merits and entered judgment in favor of plaintiff on his note and of claim." And the argument in plaintiff's brief clearly shows by the question that the reason for the court striking the affidavit of merits from the files was that it stated no legal defense. In other words, the court treated the motion as a demurrer, and in those circumstances, of course, no bill of exceptions are necessary. Harmon v. Gallagher, 88 Ill. 89.

The defendants argue that the judgment of the Circuit Court establishing Moorhouse's lien on the 6000.00 deposited with the clerk of that court was erroneous for the reason that the matter was pending in the Probate Court in the instant case when filed and we do have decided that case a

and have held that Mecartney was entitled to a lien on the $5500.00 to the extent of $2230.94.

The record before us clearly shows that in the Circuit Court proceeding, where Mecartney's fees were fixed at $7,000.00, defendants were given credit for the amount of the note in suit, and having been given credit for it in that case, they could not now, of course, ask credit for it again, as they are in effect seeking to do here. But counsel for defendants seems to argue that if the note were not paid it was Mecartney's fault that he did not pay it out of the money in the hands of the clerk of the Circuit Court. The money in the hands of the clerk was deposited there for the defendants here and Mecartney would not be authorized to apply it toward the payment of the note without the consent of the defendants, since it was their money. The defendants having been given credit for the amount of the note in the Circuit Court, they cannot in this proceeding be heard to say that the note was given without consideration.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. and TAYLOR, J. CONCUR.

and here hold that Gourtney was entitled to a lien on the $5000.00 to the extent of $2500.00.

The record before us clearly shows that in the Circuit Court proceeding, where Courtney's fees were fixed at $7,000.00, defendants were given credit for the amount of the note in suit, and having been given credit for it in that case, they could not now, of course, ask credit for it again, as they are in effect seeking to do here. But counsel for defendants seems to argue that if the note were not paid it was Courtney's fault that he did not pay it out of the money in the hands of the clerk of the Circuit Court. The money in the hands of the clerk was impounded there for the defendants here and Courtney could not be authorized upon it toward the payment of the note without the consent of the defendants, since it was their money. The defendants having been given credit for the amount of the note in the Circuit Court, they cannot in this proceeding be heard to say that the note was given without actual consideration.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

TRADER, P.J. and LEWIS, J. concur.

206 - 27163

Certiorari denied

ACME PETROLEUM COMPANY,
a corporation,

Appellee,

v.

DIAMOND RED PAINT COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 596

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by reason of the defendant's breach of a contract entered into between the parties. The case was tried before the court without a jury, and there was a finding and judgment in plaintiff's favor for $1710.00, to reverse which defendant prosecutes this appeal.

The record discloses that the parties entered into a written agreement May 14, 1920, whereby plaintiff sold 12 carloads of Big Heart Gas Oil to the defendant for 10¢ per gallon, the oil to be shipped by plaintiff to defendant upon the latter's furnishing shipping instructions not later than the 25th day of any month preceding the month of shipment. The contract further provided that one car was to be shipped in May, two in June, two in July, two in August, two in September, and one each in the months of October, November and December; all of the shipments to be made on or before December 31, 1920. The evidence shows that eight of the cars were delivered and paid for, and they are in no way involved in this suit. On November 20, 1920, four of the twelve cars had not been shipped, and on that date

No. - 27103

ACME PETROLEUM COMPANY,
a corporation,

Appellee,

v.

DIAMOND RED PAINT COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

SPECIAL ESQ

Mr. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought this action against defendant to recover damages claimed to have been sustained by reason of the defendant's breach of a contract entered into between the parties. The case was tried before the court without a jury, and there was a finding and judgment in plaintiff's favor for $1,210.00, to reverse which defendant prosecutes this appeal.

The record discloses that the parties entered into a written agreement on [illegible], whereby plaintiff sold 12 barrels of Big Mack Oil [illegible] defendant for 10¢ per gallon, the oil to be shipped by plaintiff to defendant upon the latter's furnishing shipping instructions not later than the 25th day of any month preceding the month of shipment. The contract further provided that one car was to be shipped in May, two in June, two in July, two in August, two in September, and one each in the months of October, November and December; all of the shipments to be made on or before December 31, 1920. The evidence shows that eight of the cars were delivered and paid for, and they are in no way involved in this suit. On November 30, 1920, four of the twelve cars had not been shipped, and on that date

defendant wrote plaintiff that it had then on hand sufficient gas oil to operate its plant for the next four months, and notified plaintiff that it would not need the car which was to be delivered in December, nor would they need "the three cars whose shipment has now been lapsed." This letter was received by the plaintiff on November 22, 1920, and on that date plaintiff replied stating that the delay in shipping the three cars was caused by the defendant, and suggesting that the defendant take the remaining four cars. On December 1 defendant replied to this letter that it considered the contract to mean that the three cars had lapsed and only the December car remained, and they notified plaintiff again that they did not wish the December car. Other correspondence passed between the parties, but defendant refused to take any more of the oil, and this suit was brought.

The contract provided, inter alia, for the shipment of the twelve cars by the plaintiff to the defendant upon the latter giving shipping directions as above stated, and further provided "If during any month Buyer's plant will not consume gallonage above specified, Buyer shall notify Sellers in writing ten days prior to the first day of such month, and Sellers shall not be obligated to ship nor Buyer obligated to accept such quantity for said month. * * * Each shipment hereunder to constitute a separate transaction and lapse of any one or more shipments for any of the causes herein allowed shall not cancel this contract as to other shipments, but the Sellers shall not be required to ship, nor the Buyer obliged to receive oil to cover the shipments which have so lapsed."

The defendant contends that since it had received but eight cars of the oil, the last one during November, that

defendant wrote plaintiff that it had then on hand sufficient gas oil to operate its plant for the next four months, and notified plaintiff that it would not need the car which was to be delivered in December, nor would they need "the three cars where shipment has now been lapsed." This letter was received by the plaintiff on November 22, 1926, and on that date plaintiff replied stating that the delay in shipping the three cars was caused by the defendant, and suggesting that the defendant take the remaining four cars. On December 1 defendant replied to this letter that it considered the contract to mean that the three cars had lapsed and only the December car remained, and they notified plaintiff again that they did not want the December car. Other correspondence passed between the parties, but defendant refused to take any more of the oil, and this suit was brought.

The contract provided, <u>inter alia</u>, for the shipment of the twelve cars by the plaintiff to the defendant upon the latter giving shipping directions as above stated, and further provided "If during any month Buyer's plant will not consume gallonage above specified, Buyer shall notify Seller in writing ten days prior to the first day of such month, and Seller shall not be obligated to ship her Buyer obligated to accept such quantity for said month. * * * Upon shipment hereunder to constitute a separate transaction and lapse of any one or more shipments for any of the causes herein allowed shall not cancel this contract or to either shipments, but the Seller shall not be required to ship, nor the Buyer obliged to receive oil to cover the shipments which have so lapsed."

The defendant contends that since it had received but eight cars of the oil, the last one during November, that

on November 20 when it wrote the letter above mentioned, the delivery of three of the four remaining cars had lapsed and, therefore, plaintiff was not obligated to deliver and defendant was not obligated to receive these three cars. And since on November 20 defendant notified plaintiff that it would not require the December car, and this being ten days before the first day of December, it was not obligated to take that car, and, therefore, plaintiff was not entitled to recover any sum.

We think this result is not in accordance with the terms of the contract quoted. For it is expressly provided that if the defendant's plant would not consume the gallonage specified, then the defendant might give plaintiff notice in writing ten days prior to the first day of the month, and if this were done, and the fact was that defendant's plant would not consume such gallonage, then the defendant would not be required to take such car, and the delivery of that car would be considered as lapsed under the terms of the contract. But there is no contention that the defendant gave any such notice until November 20, and, therefore, under the contract, the delivery of the three cars had not then lapsed. As to the December car, the notice was mailed on November 20, 1920, but was not received until November 22. This was not ten days before the first of December, and consequently the notice was insufficient to relieve defendant of the obligation to take the December car. This being the construction we place on the contract it is obvious that the evidence offered on behalf of the defendant tending to show that it had purchased no oil from any other concern and that it had sufficient oil for its plant, could in no way effect the result of the suit. So that the exclusion of any evidence offered tending to sustain this contention of the defendant was not error.

on November 20 when it wrote the letter above mentioned, the delivery of three of the four remaining cars had lapsed and, therefore, plaintiff was not obligated to deliver and defendant was not obligated to receive these cars. And since on November 20 defendant notified plaintiff that it would not require the December car, and this being ten days before the first day of December, it was not obligated to take that car, and, therefore, plaintiff was not entitled to recover any sum.

We think this result is not in accordance with the terms of the contract quoted. For it is expressly provided that if the defendant's plant is not ready to receive the cars specified, then the defendant might give plaintiff notice in writing ten days prior to the first day of the month, and if this was done, and the defendant's plant would not receive the cars, in a reasonable time it was not required to take such car, and the delivery of that car would be cancelled as issued under the terms of the contract. But there is no contention that the defendant gave any such notice until November 20, and, therefore, under the contract, the delivery of the three cars was not due lapsed. As to the December car, the notice was mailed on November 20, 1917, but was not received until December 22. This was not ten days before the first of December, and consequently the notice was insufficient to relieve defendant of the obligation to take the December car. Then being the contract under the contract it is obvious that the evidence offered by the defendant tending to show that it had purchased the oil for its own other cars and that it had sufficient oil for its cars, could in no way affect the result of the suit. So that the exclusion of any evidence offered tending to question the construction of the defendant was not error.

The evidence shows that on November 24, two days after plaintiff had received defendant's letter of November 20 refusing to accept the four remaining cars, the plaintiff sold the oil. Other evidence was introduced showing the market price of similar oil on December 1, 1920, as tending to show the amount of plaintiff's damages. Defendant contends that even if it was required, under the terms of the contract, to accept the remaining four cars, the judgment is wrong because plaintiff, in its statement of claim, alleged that it was ready, able and willing to deliver the oil, and that the evidence shows that it was not able to make delivery because it sold the oil on November 24. There is some argument whether the contract was breached on November 20 or on December 1, or a few days later. While plaintiff, after receiving the letter of November 20, endeavored to induce the defendant to accept the remaining cars, yet we think it was at liberty to treat the contract as terminated on November 20, in accordance with defendant's letter of that date. This being true, the evidence is sufficient without considering any other in the record, to show that plaintiff was ready, able and willing to deliver the oil as it alleged in its statement of claim.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

The evidence shows that on November 24, the day after plaintiff had received defendant's letter of November 20 refusing to accept the four remaining cars, the plaintiff sold the oil. Other evidence was introduced showing the market price of similar oil on December 1, 1920, so tending to show the amount of plaintiff's damages. Defendant contends that even if it was convicted, under the terms of the contract, to accept the remaining four cars, the judgment in favor of the defendant plaintiff. In [illegible] of this, alleged that it was ready, able and willing to deliver the oil, and that the evidence shows that it was not able to make delivery because it sold the oil on November 24. There is some [illegible] that the contract was breached on November 20 or on November 1, or a few days later. Since plaintiff, after receiving the letter of November 20, unequivocally [illegible] the defendant to accept the remaining cars, [illegible] to treat the contract as breached [illegible] in accordance with defendant's letter of that date. [illegible] the evidence is sufficient without considering any other in the record, to show that plaintiff was ready, able and willing to deliver the oil as it offered in its [illegible].

The judgment of [illegible] is affirmed.

[illegible]

TERRY, P.J., and [illegible], J., concur.

244 - 27202

L. KRIMMER, doing business as L. K. Thread Co.,
Appellee,

v.

GORDON BROS. CAP CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 596

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover the purchase price of thread sold by it to defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $507.55, to reverse which defendant prosecutes this appeal.

Defendant's position is that it gave an order for the thread to plaintiff's salesman upon the express agreement that the thread would be similar in quality to a sample which the salesman exhibited; that upon receipt of the thread it was examined and found to be inferior to the sample and so defective that it could not be used by the defendant. Thereupon defendant, in accordance with its agreement with plaintiff's salesman, returned the thread to plaintiff. In other words, defendant's contention is that the sale was by sample and since the goods did not correspond to the sample and were properly returned to plaintiff. The thread appears to have been lost in transit and it does not appear that either party ever recovered possession of it.

Plaintiff's position is that it sold "Old Reliable" thread to the defendant; that that kind of thread was deliver-

244 - 87202

L. KRIEGER, doing business as L. K. Thread Co., Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
GORDON BRED. DAY CO., Appellant.	

327 I.A. 596

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover the purchase price of thread sold by it to defendant. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for $207.38, to reverse which defendant prosecutes this appeal.

Defendant's position is that it gave an order for the thread to plaintiff's salesman upon the express agreement that the thread would be similar in quality to a sample which the salesman exhibited; that upon receipt of the thread it was examined and found to be inferior to the sample and so defective that it could not be used by the defendant. Thereupon defendant, in accordance with the agreement with plaintiff's salesman, returned the thread to plaintiff. In other words, defendant's contention is that the sale was by sample and since the goods did not corresponds to the sample and were properly returned to plaintiff. The thread appears to have been lost in transit and it does not appear that either party ever received possession of it.

Plaintiff's position is that it sold "Old Reliable" thread to the defendant; that that kind of thread was delivery-

ed and that the sale was not by sample. The court found in favor of the plaintiff and thereby sustained plaintiff's contention that the sale was not by sample. Defendant contends that this finding is against the manifest weight of the evidence.

Plaintiff to maintain his case introduced the deposition of the salesman who took the order for the thread, and twelve letters which afterwards passed between the parties. The salesman testified that he called on defendant at its place of business in Chicago on or about June 2, 1920, and talked to Harry Gordon, the secretary and treasurer of defendant, for the purpose of selling thread; that Gordon asked him "What is the price of the thread we bought from you last time?" and that the witness replied that if defendant would buy a quantity of about 200 tubes, he would give a special price of $2.50 per tube; that plaintiff could make this price on a large order because he would save express charges in shipping the thread. He further testified that Gordon replied, "Well, that price will suit me. You can ship me 200 tubes of 'Old Reliable' thread, size No. 70/2 ply."; that nothing was said at that time about a sample and that he did not exhibit a sample although he had one with him; that he had on a prior occasion sold defendant an order of "Old Reliable" thread and that on that occasion he had shown the sample to defendant. This deposition was taken in New York City. There was no cross-examination. The twelve letters that passed between the parties were then introduced by the plaintiff. The first dated June 2, 1920, from the plaintiff to the defendant states that plaintiff had entered the order for "200 tubes No. 70/2 ply, black silk finish, 12,000 yds. Old Reliable @ $2.50" and that they would endeavor to get it forward by

ed and that the sale was not by sample. The court found in favor of the plaintiff and thereby sustained plaintiff's contention that the sale was not by sample. Defendant contends that this finding is against the manifest weight of the evidence.

Plaintiff to maintain his case introduced the deposition of the salesman who took the order for the thread, and twelve letters which allegedly passed between the parties. The salesman testified that he called on defendant at its place of business in Chicago on or about June 2, 1950, and talked to Harry Gordon, the secretary and treasurer of defendant, for the purpose of selling thread; that Gordon asked him "What is the price of the thread we bought from you last time?" and that the witness replied that if defendant would buy a quantity of about 500 tubes, he would give a special price of $2.50 per tube; that plaintiff could make this price on a large order because he could save express charges in shipping the thread. He further testified that Gordon replied, "Well, that price will suit us. You can ship me 500 tubes of 'Old Reliable' thread, size no. 70\2 ply."; that nothing was said at that time about a sample and that he did not exhibit a sample although he had one with him; that he had on a prior occasion sold defendant an order of "Old Reliable" thread and that on that occasion he had shown the sample to defendant. This deposition was taken in New York City. There was no cross-examination. The twelve letters that passed between the parties were then introduced by the plaintiff. The first dated June 2, 1950, from the plaintiff to the defendant shows that plaintiff had entered the order for 500 tubes No. 70\2 ply, black silk finish, 12,000 yds. Old Reliable @ $2.50" and that they would endeavor to get it forward by

express within ten days. The letter further stated that "If the above description is not correct, please notify us at once," as the order could not be canceled or changed after being placed in the process of making except for plaintiff's fault. On June 23 defendant wrote plaintiff stating that it had returned by express 203 tubes of thread "which we can't use because the thread is not satisfactory. We have tested one spool and found we could not use it." To this plaintiff replied on June 25 that he could not understand any "shortcoming that may have occurred to the goods we shipped you, to our records they were perfect. We await the arrival of the case for our inspection and will replace the same." On August 16 plaintiff wrote defendant that the thread which defendant had returned had not as yet been received, and spoke about filing a claim against the express company. To this letter defendant replied on August 23 stating that it had not received the goods back or heard from the express company. On September 8 plaintiff wrote defendant that he had been notified by the express company that defendant had received the goods on June 16; that defendant had written a letter to plaintiff on June 23 advising plaintiff that it had returned 203 tubes of thread, but that plaintiff did not receive any part of this, and stating that it was defendant's duty to file a claim against the express company for this lost merchandise; that plaintiff had endeavored to locate it without success; that defendant was responsible to plaintiff for the goods and that it should file its claim with the express company for the loss. On September 24 plaintiff wrote defendant demanding payment, and on October 1 it again wrote defendant asking for payment. On October 9 defendant wrote plaintiff acknowledging receipt of demand for payment and calling attention to defend-

express within ten days. The letter further stated that "If the above description is not correct, please notify us at once," as the order could not be cancelled or changed after being placed in the process of making except for plaintiff's fault. On June 22 defendant wrote plaintiff stating that it had returned by express 202 tubes of thread "which we can't see because the thread is not satisfactory. We have tested one spool and found we could not use it." To this plaintiff replied on June 23 that he could not understand any "misunderstanding that may have occurred to the goods we shipped you, to our records they were perfect. We await the arrival of the same for our inspection and will advise the case." On August 16 plaintiff wrote defendant that the thread which defendant had returned has not as yet been received, and spoke about filing a claim against the express company. To this letter defendant replied on August 23 stating that it had not received the goods back or heard from the express company. On September 8 plaintiff wrote defendant that he had been notified by the express company that defendant had received the goods on June 16; that defendant had written a letter to plaintiff on June 22 advising plaintiff that it had returned 202 tubes of thread, but that plaintiff did not receive any part of this, and asking that it was defendant's duty to file a claim against the express company for this lost merchandise; that plaintiff had endeavored to locate it without success; that defendant was responsible to plaintiff for the goods and that it should file the claim with the express company for the loss. On September 24 plaintiff wrote defendant demanding payment, and on October 1 it again wrote defendant asking for payment. On October 9 defendant wrote plaintiff acknowledging receipt of demand for payment and calling attention to defend-

ant's letter of June 23d, which would explain defendant's position. On October 11 plaintiff replied again asking for payment, to which defendant replied on October 23 that it had taken the matter up with the express company and would let plaintiff know of the result. On January 10, 1921, plaintiff wrote that it had complied with defendant's request of the 7th inst. by sending a duplicate invoice to the express company at Chicago.

Harry Gordon, secretary and treasurer of defendant company, testified that in the early part of June, 1920, plaintiff's salesman called at defendant's place of business in Chicago and showed them some thread; that the witness stated that he could not buy the thread because "It doesn't work"; that he could not use the thread because it was not satisfactory; that the salesman showed him a sample and told him to test it and that if the thread was not satisfactory and the same as the sample, it could be returned, as had a prior quantity which plaintiff had sold defendant on another occasion. The witness then testified that he had one of defendant's employes, Harry Simon, test the sample and it was found satisfactory; that he then gave the salesman the order, and that afterwards when the thread was received the opened part of it and again had Simon test it and it was found to be "knotty" and "straggly" and could not be used; that thereupon he took the thread to the express company to be sent back to plaintiff in New York City. This witness is corroborated by his brother as to what took place at the time the order was given to the salesman, and by Harry Simon as to the testing of the sample and of the thread when it was delivered to defendant to the effect that it was knotty and could not be used.

and's letter of June 22d, which would explain defendant's position. On October 11 plaintiff replied again asking for payment, to which defendant replied on October 23 that it had taken the matter up with the foreign company and would let plaintiff know of the result. On January 16, 1941, plaintiff wrote that it had complied with defendant's request of the 23d inst. by sending a duplicate invoice to the express company at Salvage.

Harry Gordon, secretary and treasurer of defendant company, testified that in the early part of June, 1941, plaintiff's salesman called at defendant's place of business in Chicago and showed them some thread; that the witness stated that he could not buy the thread because "It doesn't work"; that he could not use the thread because it was not satisfactory; that the salesman showed him a sample and told him to test it and that if the thread was not satisfactory and the same as the sample, it would be returned, as has a prior quantity which plaintiff had sold defendant on another occasion. The witness then testified that he had one of defendant's employees, Harry Simon, test the sample and it was found satisfactory; that on that have the salesman the order, and that afterwards when the thread was received the opened part of it and again had Simon test it and it was found to be "knotty" and "strength" was could not be good; that thereupon he took the thread to the express company to be sent back to plaintiff in New York City. This witness is corroborated by his brother as to work took place at the time the order was given to the salesman, and by Harry Simon as to the testing of the sample and of the thread when it was delivered to defendant to the effect that it was knotty and could not be used.

The witness Harry Gordon further testified that he had been using thread in his business for sixteen years, and in speaking of the prior sales of thread by plaintiff to defendant which was discussed at the time the sale in question was made, he testified: "He sold me old reliable thread - and it was returned * ** The old reliable I sent them back first because it wasn't satisfactory to me; it is breaking; it slips and it breaks, and they gave me a receipt for it." Later on he testified concerning the order in question: "Q. Did he say anything about the old reliable? A. He was supposed to give me L.Z. I don't know anything about old reliable. I don't know anything about it in the order. * * * L.Z. thread was supposed to be sold. THE COURT: Who said that? THE WITNESS: The salesman. I don't know anything about old reliable; I never heard that word before."

We have set forth the substance of all the evidence in the record and after a careful examination of it we are unable to say that the finding of the court to the effect that the sale was not by sample is against the manifest weight of the evidence. In these circumstances we cannot under the law disturb the judgment. A consideration of the evidence shows that the order was placed about June 2, and this was confirmed by the plaintiff by letter at about that time; that when defendant returned most of the goods on June 23 it wrote plaintiff that they were not satisfactory, and in the other correspondence that passed between the parties nothing is said to indicate that the sale was by sample. This seems significant because if the sale had been by sample it would have been the natural thing for the defendant to have objected to the goods on the ground that they did not correspond to the sample. The first time this question appears was when

The witness Harry Gordon Thatcher testified that he had been using thread in his business for sixteen years, and in speaking of the prior sales of thread by plaintiff to defendant which was discovered at the time the sale in question was made, he testified: "He sold me old reliable thread - and it was returned - the old reliable I sent them back first because it wasn't satisfactory to me; it is breaking; it splits and it breaks, and they gave me a receipt for it."

Later on in testified concerning the order in question:

"Q. Did he say anything about the old reliable? A. He was supposed to give me L.S. I don't know anything about old reliable. I don't know anything about it in the order. - - L.S. thread was supposed to be sold. THE C. MT: Who said that? THE WITNESS: The salesman. I don't know anything about old reliable; I never heard that word before."

We have set forth the substance of all the evidence in the record and after a careful examination of it we are unable to say that the finding - the result to our effect that the sale was not by sample is against the manifest weight of the evidence. In these circumstances we cannot under the law disturb the judgment. A consideration of the testimony shows that the order was placed about June 2, and this was confirmed by the plaintiff by letter at about that time; that when defendant returned most of the goods on June 23 it wrote plaintiff that they were not satisfactory, and in the other correspondence that passed between the parties nothing is said to indicate that the sale was by sample. This seems significant because if the sale had been by sample it would have been the natural thing for the defendant to have objected to the goods on the ground that they did not correspond to the sample. The first time this question appears was when

the defendant filed its affidavit of merits.

Since we are unable to say that the finding of the court is against the manifest weight of the evidence, the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

THOMSON P. J. AND TAYLOR, J. CONCUR.

the defendant filed its affidavit of merits.

Since we are unable to say that the finding of the court is against the manifest weight of the evidence, the judgment of the Municipal Court of Chicago must be affirmed.

AFFIRMED.

THEMIS N. J. AND TAYLOR, J. CONCUR.

253 - 27211

HYMAN EPSTEIN, a minor by Aaron Epstein, his father and next friend,

Appellant,

v.

S. KARPEN & BROS., a corp.,

Appellee.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

227 I.A. 596

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Hyman Epstein, a minor, by his next friend, brought suit against S. Karpen & Bros., a corporation, to recover damages for personal injuries claimed to have been sustained by him. A demurrer was sustained to his amended declaration. He elected to stand by the declaration and the suit was dismissed at his costs, to reverse which he prosecutes this appeal. The only question for decision, therefore, is whether the amended declaration stated a cause of action.

In each count of the declaration it is alleged that plaintiff was a minor under the age of 21 years; that on August 16, 1917, the defendant was possessed of a certain manufacturing establishment and had therein certain machinery for the purpose of manufacturing furniture; that on July 1, 1917, plaintiff applied to the defendant for employment in the manufacturing establishment during vacation; that defendant agreed to employ him in the office of such establishment; that when plaintiff went to work he was not put to work in the office but was put to work packing boards taken from the back of a

265 - 27411

HYMAN EPSTEIN, a minor
by Aaron Epstein, his
father and next friend,

Appellant,

v.

S. KLEINER & BROS., a corp.,

Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

29 I.A. 595

MR. JUSTICE CRAWFORD delivered the opinion of the court.

Hyman Epstein, a minor, by his next friend, brought suit against S. Kleiner & Bros., a corporation, to recover damages for personal injuries claimed to have been sustained by him. A demurrer was sustained to his amended declaration. He elected to stand by the declaration and the suit was dismissed at his costs, to reverse which he prosecutes this appeal. The only question for decision, therefore, is whether the amended declaration stated a cause of action.

In each count of the declaration it is alleged that plaintiff was a minor under the age of 21 years; that on August 16, 1917, the defendant was engaged of a certain manufacturing establishment and had in said certain machinery for the purpose of manufacturing furniture; that on July 1, 1917, plaintiff applied to the defendant for employment in the manufacturing establishment during vacation; that defendant agreed to employ him in the office of such establishment; that when plaintiff went to work he was not put to work in the office but was put to work packing boxes taken from the back of a

machine, which was without his or his parents' consent; that after having worked at this employment for a number of weeks, on August 6, 1917, he was ordered to work at a dangerous machine by one of the foremen; that such employment was dangerous and one at which a minor was by statute forbidden to work; that he was, therefore, illegally employed contrary to the statute and was not within the provisions of the Workmen's Compensation Act, and while so employed he was severely injured.

As we understand counsel for plaintiff's argument, it is that the court sustained the demurrer to the amended declaration because it did not state the age of the minor, and, therefore, did not state a cause of action, but that plaintiff's remedy, if any, was under the Workmen's Compensation Act; that the Compensation Act does not apply where minors are illegally employed.

We think it clear from the allegations of the declaration that both parties were engaged in an extra-hazardous occupation within the meaning of section 3 of the Compensation Act. Section 5 of the Workmen's Compensation Act provides that a minor who is legally permitted to work under the laws of the State is considered an employe and is bound by the provisions of that Act. It follows, therefore, that if plaintiff was legally employed, his remedy would be under that Act and he would have no action at common law. In the declaration it is alleged that plaintiff was employed contrary to the provisions of the statute of this State, but nowhere is it pointed out in the brief or argument what statutes were being thus violated. But from defendant's brief we infer that the contention of plaintiff was that he had been employed contrary to the provisions of Section 20, Ch. 48, R.S., known as the Child Labor Act. That act provides that no

machine, which was without his or his parents' consent; that after having worked at this employment for a number of weeks, on August 6, 1917, he was ordered to work at a dangerous machine by one of the foremen; that such employment was dangerous and one at which a minor was by statute forbidden to work; that he was, therefore, illegally employed contrary to the statute and was not within the provisions of the Workmen's Compensation Act, and while so employed he was severely injured.

As we understand counsel for plaintiff's argument, it is that the court sustained the demurrer to the amended declaration because it did not state the age of the minor, and, therefore, did not state a cause of action, but that plaintiff's remedy, if any, was under the Workmen's Compensation Act; that the Compensation Act does not apply where minors are illegally employed.

We think it clear from the allegations of the declaration that both parties were engaged in an extra-hazardous occupation within the meaning of section 3 of the Compensation Act. Section 8 of the Workmen's Compensation Act provides that a minor who is legally permitted to work under the laws of the State is considered an employe and is bound by the provisions of that Act. It follows, therefore, that if plaintiff was legally employed, his remedy would be under that Act and he would have no action at common law. In the declaration it is alleged that plaintiff was employed contrary to the provisions of the statute of this State, but nowhere is it pointed out in the brief or argument what statutes were being thus violated. But from defendant's brief we infer that the contention of plaintiff was that he had been employed contrary to the provisions of section 32, Ch. 48, R.S., known as the Child Labor Act. That act provides that no

minor under the age of 14 years shall be employed in any manufacturing business. It further provides that persons over the age of 14 and under the age of 16 may not be permitted to work in a manufacturing establishment unless there is first procured an employment certificate. In the case of Reszek v. Bauerle & Stark Co., 282 Ill. 557, the declaration alleged that plaintiff was 15 years of age; that the defendant was engaged in manufacturing sewing machines and operated sand-papering machines; that plaintiff was employed contrary to the statute in operating one of these machines. The contention was that plaintiff was under the Workmen's Compensation Act and, therefore, he had no remedy at common law. The court there said (p.559): "Plaintiff was between the ages of fourteen and sixteen years and might legally be employed in a manufacturing establishment, though not to work with certain appliances or machinery, including sand papering machines, but he could not be legally employed without a permit required by law of minors between the ages of fourteen and sixteen years. No such permit was obtained by plaintiff authorizing his employment in defendant's factory for any purpose, and, as we understand the definition of employees made subject to the Workmen's Compensation Act by section 5 of said act, it embraces only minors who are legally permitted to work. A minor under the age of fourteen years could not lawfully be employed to work in a manufacturing establishment, and if employed contrary to law and injured while so employed, he could not be regarded as an employee within theprovisions of the Workmen's Compensation Act. The same rules applies where a minor between the ages of fourteen and sixteen years is working without permit having been obtained. In both cases the employment is unlawful." It was there held that since the plaintiff, who was but fifteen years of age, had not

minor under the age of 16 years shall be employed in any manufacturing business. It further provides that persons over the age of 16 and under the age of 18 may not be permitted to work in a manufacturing establishment unless there is first procured an employment certificate. In the case of Hoerle v. Murphy & Czerk Co., 282 Ill. 527, the defendant alleged that plaintiff was 18 years of age; that the defendant was engaged in manufacturing sewing machines and operated sand-papering machines; that plaintiff was employed contrary to the statute in operating one of these machines. The contention was that plaintiff was under the workmen's Compensation Act and, therefore, he had no remedy at common law. The court there said (p.528): "Plaintiff was between the ages of fourteen and sixteen years and might legally be employed in a manufacturing establishment, though not to work with certain appliances or machinery, including sand papering machines, but he could not be legally employed without a permit required by law of minors between the ages of fourteen and sixteen years. No such permit was obtained by plaintiff authorizing his employment in defendant's factory for any purpose, and, so we understand the definition of employees made subject to the Workmen's Compensation Act by section 3 of said act, it embraces only minors who are legally permitted to work. A minor under the age of fourteen years so is not lawfully be employed to work in a manufacturing establishment, and if employed contrary to law and injured while so employed, he could not be regarded as an employee within the provisions of the Workmen's Compensation Act. The same rule applies where a minor between the ages of fourteen and sixteen years is working without permit being obtained. In both cases the employment is unlawful." It was thereby held that since the plaintiff, who was but fifteen years of age, had not

obtained the permit required by statute, he was illegally employed and, therefore, not within the Compensation Act, but had his remedy at common law.

In the instant case plaintiff might have been legally employed, and if he was, he came within the Compensation Act. The declaration should have set forth facts to show that he was illegally employed before it could be held that that act did not apply. This it failed to do. It only alleged conclusions that plaintiff was illegally employed. Facts should be alleged in the declaration to show that the Compensation Act did not apply in the instant case. This was not done and no cause of action was, therefore, stated. Bishop v. C.C. Ry. Co., 290 Ill. 194. The demurrer to the declaration was properly sustained.

Plaintiff makes the further point that it if be contended that the Workmen's Compensation Act applies to minors, it is unconstitutional. Having brought this appeal to this court, that question is waived. Clark Teachers Agency v. City of Chicago, 220 Ill. App. 319; Berndt v. Chicago Rys. Co., 220 Ill. App. 307.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

obtained the permit required by statute, he was illegally employed and, therefore, not within the Compensation Act, but had his remedy at common law.

In the instant case plaintiff might have been legally employed, and if he was, he came within the Compensation Act. The declaration should have set forth facts to show that he was illegally employed before it could be held that act did not apply. This it failed to do. It only alleged conclusions that plaintiff was illegally employed. Facts should be alleged in the declaration to show that the Compensation Act did not apply in the instant case. This was not done and no cause of action was, therefore, stated. Blabon v. C.C. Sp. Co., 290 Ill. 164. The demurrer to the declaration was properly sustained.

Plaintiff makes the further point that if he contended that the Workmen's Compensation Act applies to minors, it is unconstitutional. Having brought this appeal to this court, that question is waived. Clerk Taxpayers Agency v. City of Chicago, 220 Ill. App. 319; Herbst v. Chicago Rys. Co., 241 Ill. App. 307.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

24 - 26941

(9620)

FRED V. PRATHER,
Defendant in Error,

v.

CHARLES A. KROPP,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 596

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is a writ of error to reverse a judgment of $700.00 obtained by the plaintiff for services as an architect.

On October 14, 1920, the plaintiff, Prather, brought suit against Kropp, the defendant, and in his statement of claim alleged that he was employed by the defendant to make drawings, etc. for the construction of a two story brick building and a garage, for the usual fees, being at a minimum, six per cent of the total cost of the completed work, computed upon the lowest bids of responsible contractors. It alleged further that the plaintiff did certain work, and that the lowest bid totaled $48,500.00; that the defendant abandoned the work after paying the plaintiff $500.00 and that there is now due him $1558.00, the usual, reasonable and customary price for such services.

The defendant, in his affidavit of merits alleged that on or about January 21, 1920, he paid the plaintiff $500.00 in full for all his demands; that he did not employ him thereafter to do any further work; that he never knew of

FRED V. MATHEWS,
Defendant in Error,

v.

CHARLES A. SHEPP,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAZEWE delivered the opinion of the court.

This is a suit of error to reverse a judgment of $700.00 obtained by the plaintiff for services as an architect.

On October 14, 1924, the plaintiff, Prather, brought suit against Fredo, the defendant, and in his statement of claim alleged that he was employed by the defendant to make drawings, etc. for the construction of a two story brick building and a garage, for the usual fees, being at a minimum, six per cent of the total cost of the completed work, computed upon the lowest bids of responsible contractors. It alleged further that the plaintiff did so faithfully, and that the lowest bid totaled $18,700.00; that the defendant abandoned the work after paying the plaintiff $600.00 and that there is now due him $1050.00, the usual, reasonable and customary price for such services.

The defendant, in his affidavit of merits alleged that on or about January 31, 1924, he paid the plaintiff $500.00 in full for all his services; that he did not employ him thereafter to do any further work; that he never knew of

anycustom among architects to charge seven tenths of a total fee of six per cent, to be computed upon the lowest bid; that when he employed the plaintiff, he told him that his employment would be limited to drawing plans and specifications, and that he had not decided to erect a building and garage.

At the trial, which was without a jury, certain exhibits, and the testimony of nine witnesses was introduced. The testimony of Prather, the plaintiff is substantially as follows:- That he had a talk with Kropp, the defendant, at the latter's home; that the defendant asked him what he was going to charge him for the work; that at first he said eight percent, and then said "I will be satisfied with six per cent."; that the defendant then said, "Well, we will let it go at that"; that that was for all the architectural services; that during the progress of the work on the plans quite a few changes were made; that from time to time he sent the defendant blue prints and specifications; that they agreed on the specifications; that he had various conversations with the defendant on that subject; that he, the plaintiff, started to take estimates in December, 1919; that on December 15 or 16 he told the defendant that one Peterson had made a bid which was a little over $45,000.00; that the plans for a garage were not prepared until February 20; that before January, 1920, he had received figures from Peterson and one Paul Jensen; that he told the defendant he could get a lower bid; that the defendant said "that is all right"; that about January 21, 1920, he showed the defendant the plans and asked for a payment; that the defendant said "Well, how much do you want", that he told him, $500.00; that the defendant said, "Now, is that all you want"

supervision among architects to charge seven months of a total fee of six per cent, to be computed upon the lowest bid; that when he employed the plaintiff, he told him that his employment would be limited to drawing plans and specifications, and that he had not decided to erect a building and garage.

At the trial, which was without a jury, certain exhibits, and the testimony of nine witnesses was introduced. The testimony of Webster, the plaintiff is substantially as follows:- That he had a talk with Kropp, the defendant, at the latter's home; that the defendant asked him what he was going to charge him for the work; that at first he said eight percent, and then said "I will be satisfied with six per cent."; that the defendant then said, "Well, we will let it go at that"; that that was for all the architectural services; that during the progress of the work on the plans quite a few changes were made; that from time to time he sent the defendant blue prints and specifications; that they agreed on the specifications; that he had various conversations with the defendant on that subject; that he, the plaintiff, started to take estimates in December, 1919; that on December 15 or 16 he told the defendant that the Peterson Bid made a bid which was a little over $48,000.00; that the plans for a garage were not prepared until February 20; that before January, 1920, he had received figures from Peterson and one Paul Dawson; that he told the defendant he could get a lower bid; that the defendant said "that is all right"; that about January 21, 1920, he showed the defendant the plans and asked for a payment; that the defendant said "Well, how much do you want", that he told him, $800.00; that the defendant said, "Now, is that all you want"

and he, the plaintiff said "Yes, that is about all that is due at this time, because the plans are not completed. We get to go over them and fix them up here and there." "That is sufficient at this time"; that the defendant gave him a check for $500.00 and said "If you want any more, all right"; that a great deal of work on the plans, all that concerning the garage, was done subsequent to that time; that he had a talk with the defendant, in Strandberg's presence, in March, 1920; that the defendant said he could do better than certain figures that they had; that he could "get a lump sum figure instead of a cost plus"; that the plaintiff said "All right, you have to take some figures and I will take figures"; that he called up the defendant by telephone about July first and asked him if he had obtained any better figures; that he said he had not; that he, the plaintiff, told him he had, and said, I can get it down to $37,000.00 or a little lower than that"; that the defendant then said, "I don't know what I am going to do now;" that he, the plaintiff said, "Well, if things stand that way, then I think you ought to pay me some more money"; that the defendant swore and hung up the telephone; that after the defendant requested some more plans and they were furnished; that later the defendant said he would go ahead as soon as he could get the work done for $40,000.00 for the residence.

The plaintiff testified that where the preliminary studies, general drawings, specifications, scale and full sized details have been finished by the architect, the total fee due and payable is seven tenths of the total amount of the architect's fee. He, also, testified that he had prepared the sketches and general plans, all the detailed drawings, full sized drawings, specifications and took bids; that the usual, reasonable, and customary fee charged by architects for the

and he, the plaintiff said "Yes, that is about all that is due at this time, because the plans are not complete. We had to go over them and fix them up some more." "That is sufficient at this time"; that the defendant gave him a check for $800.00 and said "If you want any more, all right"; that a great deal of work on the plans, all that concerning the garage, was done subsequent to that time; that he had a talk with the defendant, in Strandberg's presence, in March, 1930; that the defendant said he could do better than certain figures that they had; that he could "get a lump sum figure instead of a cost plus"; that the plaintiff said "All right, you have to take some figures and I will take figures"; that he called up the defendant by telephone about July first and asked him if he had obtained any other figures; that he said he had not; that he, the plaintiff, told him he had, and said, I can get it done to $27,000.00 or a little lower than that"; that the defendant then said, "I don't know what I am going to do now;" that he, the plaintiff said, "Well, if things stand that way, then I think you ought to pay me some more money"; that the defendant came and talk to the telephone; that after the defendant returned, some more plans and specs were furnished; that later the defendant said he would go ahead and see how far he could get the work done for $4,[illegible].00 for the residence.

The plaintiff testified that where the preliminary studies, general drawings, specifications, etc. and full sized details were been finished by the architect, the total fee due and payable is seven tenths of the total amount of the architect's fee. He, also, testified that he had prepared the sketches and general plans, all the full sized drawings, "all full sized drawings, specifications and lock plus" that he owed, reasonable, and customary for charges by architects for the

work testified to is from 7 to 17½ per cent of the total cost of the building, as estimated by reliable contractors and that there is a discount as to the fee charged when the work has been abandoned.

On cross examination the evidence of the plaintiff is to the effect that at an early conversation the defendant said he would not go higher than $25,000.00 for the residence; that when the plans and specifications have been drawn seven tenths of the architect's work is done; that changes were suggested after the first drawings, one of which was a solarium that would cost from $8,000.00 to $10,000.00.

It is the evidence of one Sohn, employed by the plaintiff, an architect, that he worked on the plans and specifications in question from October 1919, to the latter part of February 1920; that the time they worked on them, if all put together, would be three months; and that the usual, reasonable and customary charge for such services would be $3,000.00. One Vesely, also an architect employed by the plaintiff, stated that he worked on the same matter, on the pencil drawings, etc. for about 150 hours. It is the evidence of one Strandberg that on March 31, 1920, he submitted a written estimate, addressed to the plaintiff, of $37,500.00 for the residence, and $7,000.00 for the garage; that shortly after, he had a talk with the defendant at the latter's home; that the defendant said he would like to get it done a little cheaper; that he asked why the Stranberg Co. would not guarantee its estimate; that they discussed making changes and substitutions, but that the defendant would not agree to any important alterations; that he said he thought he could have it done for less than our estimate and get a guarantee; that he had one already that was better.

work testified to is from 7 to 12½ per cent of the total cost of the building, as estimated by reliable contractors and that there is a discount on to the fee charged when the work has been abandoned.

On cross examination the evidence of the plaintiff is to the effect that at an early conversation the defendant said he would not go higher than $25,000.00 for the residence; that when the plans and specifications have been drawn seven tenths of the architect's work is done; that changes were suggested after the first drawings, one of which was a solarium that would cost from $5,000.00 to $10,000.00.

It is the evidence of Joe John, employed by the plaintiff, an architect, that he worked on the plans and specifications in question from October 1919, to the latter part of February 1920; that the time they worked on them, if all put together, would be three months; and that the usual, reasonable and customary charge for such services would be $1,000.00. One Vessely, also an architect employed by the plaintiff, stated that he worked on the same matter, on the pencil drawings, etc. for about 150 hours. It is the evidence of one Strandberg that on March 31, 1920, he submitted a written estimate, addressed to the plaintiff, of $27,327.00 for the structure, and $7,000.00 for the garage; that shortly after, he had a talk with the defendant at the latter's home; that the defendant said he could like to get it done a little cheaper; that he asked why the Strandberg Co. would not substitute for a cheaper that they discussed making a number of substitutions, but that the defendant said not agree to any important alterations; that he said he thought he could have it done for less than our estimate and get a guarantee; that he had one already that was better.

One Kirch, a general contractor and builder, testified that he examined the plans and specifications at the instigation of the plaintiff, and in June, 1920, made an estimate of cost, and later asked the plaintiff how the owner received it; that the plaintiff then called up the owner and talked with him.

A witness, Davidson, an architect and engineer, testified that in Chicago there exists a custom of charging six per cent on the actual or estimated cost of the work; that an estimate is prepared by the architect or a contractor is asked for his opinion, and the architect's bill based on two or more estimates of reputable contractors; that when the work is abandoned the custom is to charge seven tenths of the whole fee; that the cost of putting up such a building and garage as contemplated by the plans and specifications would have been not less than $50,000.00.

Erickson, an architect, testified that his estimate of the cost of such a building and garage, built according to the plans of such a building and garage, built according to the plans and specifications would be $48,000.00; that he had a talk with the defendant in which the latter asked him what he thought of the plans and that he told the defendant they were all right and would make a good building; that later the defendant told him that he had bought a building that was about completed. One Cady, an architect, testified that he examined the blue prints and the drawings for the defendant; that he questioned whether there was a customary fee in Chicago; that in 1919 architects charges for residence work were between five and ten per cent based on the cost of the work itself as executed.

Gibson, a general contractor and builder, testified that he examined the plans and specifications at the investigation of the plaintiff, and in June, 1922, made an estimate of cost, and later asked the plaintiff was the owner received it; that the plaintiff then called up the owner and talked with him.

A witness, Davidson, an architect and engineer, testified that in Chicago there exists a custom of charging six per cent on the actual or estimated cost of the work; that an estimate is prepared by the architect or a contractor is asked for his opinion, and the architect's bill based on two or more estimates of reputable architects; that when the work is abandoned the custom is to charge seven tenths of the whole fee; that the cost of putting up such a building and garage as contemplated by the plans and specifications would have been not less than $8,[illegible].00.

Erickson, an architect, testified that his estimate of the cost of such a building was average, built according to the plans of such a building was average, built according to the plans and specifications would be $8,[illegible]; that he had a talk with the defendant in which he stated what he thought of the plans and that he did not thought they were all right and would make a good building; that later the defendant told him that he had to get a building that was about completed. One Jay, an architect, testified that he examined the blue prints and the drawings for the defendant; that he questioned whether there was a customary fee in Chicago; that in 1919 architects charge for residence work as a percentage and the per cent based on the cost of the work itself as executed.

For the defendant two witnesses testified, the defendant himself and his son.

It is the evidence of Kropp, the defendant, that he told the plaintiff he intended to put up a residence in Oak Park; that he went with the plaintiff to look at a house in Rogers Park; that two or three weeks afterwards he talked to him about making plans for a residence; that the plaintiff drew up some drawings and specifications and in January, 1920, asked him, the defendant, for some compensation; that at that time the specifications and drawings were not completed; that he, the defendant asked the plaintiff how much it would be after the drawings and specifications were complete; that the plaintiff said $500.00; that he then gave him a check and said, "Now this is in full to you"; that the plaintiff said, "Up to date and I will send receipt in full tomorrow." The defendant denied that the plaintiff told him he would charge him six per cent. The defendant admitted that the plaintiff worked on the plans and talked them over with Mrs. Kropp and himself, and that he took up most of the matter of changes and alterations with Mrs. Kropp, and that from time to time he brought in various sketches; that the plaintiff consulted with Mrs. Kropp more than he did with him, the defendant. He further testified that he told the plaintiff that he would have to hold the expenses down to $25,000.00; that he did not go into details as to the changes which his wife was suggesting; that some time in May, 1920, the plaintiff called him on the telephone and asked him if he intended to build; that he told him that he did not know; that he could not get any bid; that the plaintiff had not put in any bid yet; that the plaintiff then said, "You owe me money."; that he, the defendant, then said, "Oh, well, get it."; that he never got any estimate or figures about the cost of the

For the defendant two witnesses testified, the defendant himself and his son.

It is the evidence of Kropp, the defendant, that he told the plaintiff he intended to put up a residence in Oak Park; that he went with the plaintiff to look at a house in Hagere Park; that two or three weeks afterwards he talked to him about making plans for a residence; that the plaintiff drew up some drawings and specifications and in January, 1930, asked him, the defendant, for some compensation; that at that time the specifications and drawings were not completed; that he, the defendant asked the plaintiff how much it would be after the drawings and specifications were complete; that the plaintiff said $500.00; that he then gave him a check and said, "Now this is in full so far"; that the plaintiff said, "Up to date and I will send receipt in full tomorrow." The defendant denied that the plaintiff told him he would charge him six per cent. The defendant admitted that the plaintiff worked on the plans and talked them over with him. Kropp and himself, and that he took up most of the matter of changes and alterations with Mrs. Kropp, and that from time to time he brought in various sketches; that the plaintiff consulted with Mrs. Kropp more than he did with him, the defendant. He further testified that he told the plaintiff that he would have to hold the expenses down to $30,000.00; that he did not go into details as to the changes which his wife was suggesting; that some time in May, 1930, the plaintiff called him on the telephone and asked him if he intended to build; that he told him that he did not know; that he could not get any bid; that the plaintiff had not put in any bid yet; that the plaintiff then said, "You owe me money."; that he, the defendant, then said, "Oh, well, get it."; that he never got any estimate or figures about the cost of the

building after the time when Strandberg was present, some time in April; that the plaintiff never told him about a figure of $48,750.00 which he had from Peterson & Co.; that he, the defendant, never built the house, but subsequently bought one.

The son, R. A. Kropp testified that he heard a conversation about January 21, 1920, between his father, the defendant, and the plaintiff; that the plaintiff said he wanted $500.00 and the defendant asked what for, to which the plaintiff answered that it was for the drawings and specifications; that his father then asked the plaintiff if that covered all drawings and specifications; that the plaintiff said yes; that his father then gave the plaintiff a check; that when he heard the conversation he was in an adjacent room.

At the close of the evidence the trial judge made the following statement:

> "I am going to find in this case, that the defendant authorized the plaintiff to draw these plans, employed him to draw these plans, and acquiesced in the drawing of these plans that would cost at least $32,000. for the garage and the other; that these changes were made at the request of the defendant, or defendant's wife, with the acquiescence of the defendant himself - with the knowledge and acquiescence of the defendant; that whether there was a contract price of six per cent or whether there was a fair and reasonable value of six per cent - six per cent on $32,000, would be $1,920. The work is not all completed, and he has got plans to get in and the contracts to let and the supervision of the work to do yet. If he abandoned it after the contracts were in, the customary charge of seven-tenths-three-tenths off, goes to the supervision of the work. If you figure that he has done 60 per cent of the work he is hired to do, two-thirds of the work he is hired to do, and I think that is a fair estimate here, it would be about $1,200. He has been paid $500. and that would leave $700, and I will find the issues against the defendant and assess the plaintiff's damages at the sum of $700."

Accordingly, judgment was entered in favor of the plaintiff and against the defendant in the sum of $700.00 and

building after the time when Strausberg was present, some time in April; that the plaintiff never told him about a figure of $42,750.00 which he had paid Robertson & Co.; that he, the defendant, never built the house, and consequently had no [illegible].

The Hon. [illegible] testified that he heard a conversation about January [illegible], 19[illegible], between his father, the defendant, and the plaintiff; that the plaintiff said he wanted $[illegible] and the defendant asked what for, to which the plaintiff answered that it was for the drawings and specifications; that his father then asked the plaintiff if that covered all drawings and specifications; that the plaintiff said yes; that his father then gave the plaintiff a check; that when he heard the conversation he was in an adjacent room.

At the close of the evidence the trial judge made the following statement:

> "I am going to find in this case, regardless of the argument [illegible] the plaintiff [illegible] employed [illegible] to draw these plans, [illegible] drawing [illegible] plans [illegible] about $42,750.00. That the [illegible] were made at the request of the defendant, or the defendant's wife, with the acquiescence of the defendant himself – with the knowledge and acquiescence of the defendant; that whether there was a contract [illegible] or whether there was a fair and [illegible] value of his services – six per cent on $42,750.00 [illegible]. The work is not all completed, and [illegible] the supervision of the work [illegible] customary [illegible] seventy-five per cent [illegible] of the work. If you figure [illegible] it would be about $1,[illegible]. He has been paid [illegible] and that would leave $[illegible], and I will find the issues against the defendant and assess the plaintiff's damages at the sum of $[illegible]."

Accordingly, judgment was entered in favor of the plaintiff and against the defendant in the sum of $[illegible] and

costs; and by writ of error the defendant seeks a reversal of that judgment.

The evidence shows, unquestionably, an employment of the plaintiff to render certain architect's services concerning the erection of a residence and garage which the defendant had in contemplation, and, further, that the plaintiff did perform, pursuant to his employment, certain protracted and valuable services. The defendant makes two claims, first, that the plaintiff was paid $500.00 in full payment of his claim, and, second, that the plaintiff was employed to furnish plans and specifications for a building to cost not over $25,000.00 and that as the building could not be built for that sum there can now be no recovery. As to the payment of $500.00:- The evidence as to the conversation between the plaintiff and the defendant some time in the latter part of January 1920, when the plaintiff showed the defendant certain plans and asked for a payment is conflicting. The trial judge, who saw the witnesses and heard the testimony evidently concluded that what was said at that conversation and the payment of $500.00 did not constitute a settlement. If the trial judge believed the testimony of the plaintiff, he was quite justified in concluding, as he did. The plaintiff testified in substance that the payment of the $500.00 was not in full, and the defendant testified that it was, and the latter is slightly supported by the testimony of his son. With the evidence in that condition we do not feel warranted in concluding that the trial judge erred in deciding that the payment of the $500.00 was not a payment in full.

Second:- As to the claim of the defendant that the plaintiff was employed to furnish plans and specifications for a building to cost not over $25,000.00 but failed to do so.

again; and by writ of error the defendant seeks a reversal of that judgment.

The evidence shows, unquestionably, an employment of the plaintiff to render certain architect's services concerning the erection of a residence and garage which the defendant had in contemplation, and, further, that the plaintiff did perform, pursuant to his employment, certain prescribed and valuable services. The defendant makes two claims, first, that the plaintiff was paid $800.00 in full payment of his claim, and, second, that the plaintiff was employed to furnish plans and specifications for a building to cost not over $25,000.00 and that as the building could not be built for that sum there can now be no recovery. As to the payment of $800.00:- The evidence as to the conversation between the plaintiff and the defendant some time in the latter part of January 1926, when the plaintiff showed the defendant certain plans and asked for a payment is conflicting. The trial judge, who saw the witnesses and heard the testimony evidently concluded that what was said at that conversation and the payment of $800.00 did not constitute a settlement. If the trial judge believed the testimony of the plaintiff, he was quite justified in concluding, as he did. The plaintiff testified in substance that the payment of the $800.00 was not in full, and the defendant testified that it was, and the latter is mightily supported by the testimony of his son. With the evidence in that condition we do not feel warranted in concluding that the trial judge erred in deciding that the payment of the $800.00 was not a payment in full.

Second:- As to the claim of the defendant that the plaintiff was employed to furnish plans and specifications for a building to cost not over $25,000.00 but failed to do so.

The evidence shows that in August, 1919, the defendant told the plaintiff that he intended to put up a residence in Oak Park, and that shortly thereafter the plaintiff and the defendant looked at a residence which the plaintiff had built in Rogers Park. The plaintiff testified that the defendant told him that it was just about what he wanted. From that time on the plaintiff worked on plans and specifications which he presented to the defendant, and consulted with the defendant and his wife, but chiefly with the latter, about various alterations, some of which were alterations that added considerably to the cost of the building. It is not denied that the plaintiff did a great deal of work in the matter as an architect and produced and delivered to the defendant various plans and specifications. Several witnesses, employees of the plaintiff, testified as to the quantity of work which they had done in conjunction with the plans and specifications. It is insisted, however, on behalf of the defendant, that the plaintiff never prepared and delivered plans and specifications for a building which could be built for $25,000.00.

The trial judge was of the opinion that the defendant authorized the plaintiff to furnish plans, etc. for a residence and garage that could be erected for a total of $32,000.00, that is $25,000.00 for the house and $7,000.00 for the garage.

It is quite obvious, even from the evidence of the defendant himself, that substantial changes were made from time to time as the result of interviews between the plaintiff and the defendant's wife. It is the claim of the plaintiff that certain work was done which was authorized; that plans and specifications were furnished at the instigation of the defendant; that certain estimates were made and received and that, as

the evidence shows that in August, 1919, the defendant told the plaintiff that he intended to put up a residence in Oak Park, and that shortly thereafter the plaintiff and the defendant looked at a residence which the plaintiff had built in Hegere Park. The plaintiff testified that the defendant told him that it was just about what he wanted. From that time on the plaintiff worked on plans and specifications which he presented to the defendant, and consulted with the defendant and his wife, but chiefly with the latter, about various alterations, some of which were alterations that added considerably to the cost of the building. It is not denied that the plaintiff did a great deal of work in the matter as an architect and produced and delivered to the defendant various plans and specifications. Several witnesses, employees of the plaintiff, testified as to the quantity of work which they had done in connection with the plans and specifications. It is insisted, however, on behalf of the defendant, that the plaintiff never prepared and delivered plans and specifications for a building which could be built for $35,000.00.

The trial judge was of the opinion that the defendant authorized the plaintiff to furnish plans, etc. for a residence and charge that would be worth for a total of $52,000.00, that is $30,000.00 for the house and $7,000.00 for the garage.

It is quite obvious, even from the evidence of the defendant himself, that substantial changes were made from time to time as the result of interviews between the plaintiff and the defendant's wife. It is the claim of the plaintiff that certain work was done which was unauthorized; that plans and specifications were furnished at the insistence of the defendant; that certain estimates were made and received and that, as

the defendant finally abandoned the whole thing, having bought another house, the defendant was liable for the customary fees.

The trial judge held that the plaintiff had done 60% of the work he was hired to do and so allowed 60% of $1920.00, which latter figure of $1920.00 was 6% of $32,000.00, being the total cost of the house figured at $25,000.00 and a garage figured at $7,000.00. As the plaintiff had been paid $500.00 the trial judge deducted that amount from $1200.00, leaving a balance of $700.00, for which judgment was entered.

Considering all the evidence, the only reasonable conclusion seems to be that the defendant employed the plaintiff as an architect to furnish plans and specifications and render architects services for the erection of a residence and garage, and that although the defendant may have had in mind at the outset the erection of a house and garage that would cost not over $32,000.00, interviews were had from time to time between the plaintiff and the defendant and his wife which led to various changes, some of which were substantial, and that, as a result of their negotiations and the work of the plaintiff, there arose in the eyes of the law an obligation on the defendant to pay the plaintiff on a quantum meruit, that is the value of his services as determined by reason and custom.

That amount would be at least six per cent of seven tenths of $32,000.00, which would be $1344.00. And crediting $500.00, the amount paid, would leave $1036.00. The judgment which was entered, however, being less than the latter amount, and no cross errors being assigned, we are of the opinion it should stand as it is.

the defendant finally abandoned the whole thing, having bought another house, the defendant was liable for the customary fees.

The trial judge held that the plaintiff had done 80% of the work he was hired to do and so allowed 80% of $1950.00, which latter figure of $1950.00 was 5% of $39,000.00, being the total cost of the house figured at $25,000.00 and a garage figured at $7,000.00. As the plaintiff had been paid $800.00 the trial judge deducted that amount from $1950.00, leaving a balance of $750.00, for which judgment was entered.

Considering all the evidence, the only reasonable conclusion seems to be that the defendant employed the plaintiff as an architect to furnish plans and specifications and render architects services for the erection of a residence and garage, and that although the defendant can have had in mind at the outset the erection of a house and garage that would cost not over $25,000.00, interviews were had from time to time between the plaintiff and the defendant and his wife which led to various changes, some of which were substantial, and that, as a result of their negotiations and the work of the plaintiff, there arose in the eyes of the law an obligation on the defendant to pay the plaintiff on a quantum meruit, that is, the value of his services as determined by reason and custom.

Just account would be at least six per cent of seven tenths of $25,000.00, which would be $1050.00. And crediting $800.00, the amount paid, would leave $250.00. The judgment which was entered, however, being less than the latter amount, and no error appearing being committed, we are of the opinion it should stand as it is.

Some contention is made concerning a variance, and the admissibility of certain evidence. The statement of claim is somewhat inartistic in form, but a careful consideration of it, justifies the conclusion that as a statement it is sufficiently consistent with the judgment, and, also, broad enough to justify the evidence that was actually introduced.

The judgment will, therefore, be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

Some confusion is made concerning a variance, and the admissibility of certain evidence. The statement of claim is somewhat inartistic in form, but a careful consideration of it, justifies the conclusion that in a statement it is sufficiently consistent with the judgment, and, also, broad enough to justify the evidence that was actually introduced.

The judgment will, therefore, be affirmed.

AFFIRMED.

THOMPSON, P.J. AND O'CONNOR, J. CONCUR.

105 - 27055

CITY OF CHICAGO,

Appellee,

v.

J. L. OLKEN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

227 I.A. 596[5]

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 10, 1920, a complaint was filed against the defendant, Olken, charging that he;

> "Did make, aid, countenance and assist in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace.
> Did unlawfully and wilfully assault another person, to-wit, Marjorie Scherer.
> Was engaged in, abetted in a quarrel and other disturbance"; "in violation of section 2012 of an ordinance of the City of Chicago."

The case was tried before the court without a jury and the defendant found guilty of violating section 2012 of an ordinance of the City of Chicago and fined in the sum of $100.00. This appeal is from the judgment.

The evidence of the complaining witness, Marjorie Scherer, a young woman 17 years of age, is that on November 9, 1920, about 2:30 in the afternoon when she was in the wash room of the Metropolitan Business College where she attended school, the defendant came in there, took hold of her and threw her over the radiator and put his arms around her and tried to kiss her. Her testimony is entirely corroborated

CITY OF CHICAGO,

Appellee,

v.

J. J. OLKEN,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

OPINION

Mr. JUSTICE MAYER delivered the opinion of the court.

On November 10, 1950, a complaint was filed against the defendant, Olken, charging that he:

> "did wilfully, and, contemporaneous conduct in making an improper noise, disturbance, breach of the peace and diversion tending to a breach of the peace.
>
> Did unlawfully and wilfully assault another person, namely, Marjorie Scherer.
>
> Was engaged in, abetted in a quarrel and other disturbance"; "in violation of section XIII of an ordinance of the City of Chicago."

The case was tried before the court without a jury and the defendant found guilty of violating section XIII of an ordinance of the City of Chicago and fined in the sum of $100.00. This appeal is from the judgment.

The evidence of the complaining witness, Marjorie Scherer, a young woman 17 years of age, is that on November 9, 1950, about 3:30 in the afternoon when she was in the wash room of the Metropolitan Business College where she attended school, the defendant came in there, took hold of her and threw her over the radiator and put his arms around her and tried to kiss her. Her testimony is entirely corroborated

by Edith Plethow, Mildred Sleight and Florence Jurbeck, fellow students of the complaining witness.

Edith Plethow, a student, testified that the defendant "grabbed her (Marjorie Scherer) around the waist and kind of moved andshe screamed for help and tried to pull his hair." The witness Mildred Sleight, another student, testified that the defendant "grabbed hold of her (Marjorie Scherer) and threw her against the radiator and tried to put his head down on her shoulder as though he was going to bite her * * * and it looked as though he was trying to kiss her"; that Marjorie shouted for help and one of the students ran for the principle, Baker, and defendant ran out; that Marjorie was then very weak and they helped her to a chair. The witness, Florence Jurbeck, another fellow student, testified that "we were all in the wash room combing our hair and I saw Mr. Olken come in and I said to him, what are you doing here you darn fool get out of here. Mildred and I went and stood by the window and Marjorie was coming after and he grabbed Marjorie and * * * pushed her up against the radiator and put his head down by her neck * * * and he rubbed his body against hers then she hollered and we ran to her assistance." etc.

There is evidence also by one Baker, the manager of the Metropolitan Business College, that there was some trouble about a man working on the electric lights in the wash room concerning some girls in the room, and that on the afternoon in question he saw Olken, the defendant, on the second floor of the premises.

The testimony of the defendant himself is that he is an electrician and on the day in question he went in to

by Edith Plotkow, Mildred Sinight and Florence Burbank, fellow students of the complaining witness.

Edith Plotkow, a student, testified that the defendant "grabbed her (Marjorie Baker) around the waist and kind of moved another person out of the way and tried to pull his hair." The witness Mildred Sinight, another student, testified that the defendant "grabbed hold of her (Marjorie Baker) and threw her against the radiator and tried to put his head down on her shoulder as though he was going to bite her * * * and it looked as though he was trying to kiss her"; that Marjorie shouted for help and one of the students ran for the principle, Baker, and defendant ran out; that Marjorie was then very weak and they helped her to a chair. The witness, Florence Burbank, another fellow student, testified that "we were all in the wash room washing our hats and I saw Mr. Oliver come in and I said to him, what are you doing here you darn fool get out of here. Mildred and I went and stood by the window and Marjorie was coming after and he grabbed Marjorie and * * * pushed her up against the radiator and put his head down by her book * * * and he rubbed his body against here then * * * she hollered and we ran to her assistance." etc.

There is evidence also by one Baker, the manager of the Metropolitan Business College, that there was some trouble about a man working on the electric lights in the wash room concerning some girls in the room, and that on the afternoon in question he saw Oliver, the defendant, on the second floor of the premises.

The testimony of the defendant himself is that he is an electrician and on the day in question he went in to

the wash room, fixed some meters, and that none of the circumstances testified to by the four young women took place; that he merely did his work and when he got through he separated two of the girls who were standing holding hands in front of the wash bowl, in order that he might wash his hands.

Colbert, an electrician who was working for the defendant on the day in question and was with him on the second floor at the time of the circumstances herein involved, testified that he and the defendant went to the girls lavatory to take out some fuses; that the door of that room was partly open; that Olken then went to the toilet to adjust the fuse; that they were there about fifteen minutes; that the defendant walked out as soon as he tested the switch; that he heard no cry for help inside the wash room; that he heard some talking and laughing in there.

The only other testimony is that of Cohen and Weinberg that the defendant had a good reputation.

We are of the opinion that the evidence sufficiently proves that the defendant was guilty of disorderly conduct and of a violation of Section 2012 of the Ordinances of the City of Chicago.

It is contended by counsel for the defendant that the judgment is not supported by the weight of the evidence; that improper evidence was admitted; and that there is a variance between the complaint and the evidence.

The cause was tried before the court without a jury and the evidence was somewhat conflicting, but in view of the fact that three witnesses in addition to the complaining witness

the rest room. Fixed some meters, and that none of the circumstances testified to by the four young women took place; that he merely did his work and when he got through he separated two of the girls who were standing holding hands in front of the rest room. In order that he might work his hands.

Colbert, an electrician who was working for the defendant on the day in question and was with him on the second floor at the time of the circumstances herein involved, testified that he and the defendant went to the girls lavatory to take out some fuses; that the door of that room was partly open; that Colman then went to the toilet to adjust the fuse; that they were there about fifteen minutes; that the defendant walked out as soon as he tested the switch; that he heard no cry for help inside the rest room; that he heard some talking and laughing in there.

The only other testimony in most of Cohen and Weinberg that the defendant had a good reputation.

We are of the opinion that the evidence sufficiently proves that the defendant was guilty of disorderly conduct and of a violation of Section 3013 of the Ordinances of the City of Chicago.

It is contended by counsel for the defendant that the judgment is not supported by the weight of the evidence; that improper evidence was admitted; and that there is a variance between the complaint and the evidence.

The cause was tried before the court without a jury and the evidence was somewhat conflicting, but in view of the fact that three witnesses in addition to the complaining witness

testified definitely and expressly to the disorderly conduct of the defendant and that, practically considered, that evidence was not only by the denial of the defendant himself and his helper, it would not now be reasonable for us sitting in a court of review, knowing merely what the record itself presents and suggests, to override the judgment of the trial judge who not only heard the testimony of the witnesses but saw them and was able to consider more satisfactorily their credibility.

The defendant suffered no detriment by reason of the testimony of Baker concerning what was said by the "girls" concerning the identity of Olken; outside of what he testified to there was ample evidence that the defendant was the man referred to.

The argument that there is a variance between the complaint and the evidence is untenable. The court found the defendant guilty of a violation of the ordinance and it was not necessary that the court should in its finding describe in detail the facts which the evidence proved.

The court is of the opinion that the evidence sufficiently shows that the defendant was guilty of a breach of the peace and that of itself would justify the finding that was entered. The contention that there was a variation as to the name of the complaining witness and the name of the person assaulted is untenable. The name of the complaining witness was originally Marjorie Haselrich, the latter being the name of her own father. Apparently, her mother married again and her second husband was named Scherer, and the daughter, the complaining witness here, took the name of her stepfather and

testified definitely and expressly to the disorderly conduct of the defendant and that, practically considered, that evidence was not only by the denial of the defendant himself and his helper, it would not now be reasonable for us sitting in a court of review, knowing merely what the record itself presents and suggests, to override the judgment of the trial judge who not only heard the testimony of the witnesses but saw them and was able to consider more satisfactorily their credibility.

The defendant suffered no detriment by reason of the testimony of Baker concerning what was said by the "girls" concerning the identity of Ikem; outside of what he testified to there was ample evidence that the defendant was the man referred to.

The argument that there is a variance between the complaint and the evidence is unfounded. The court found the defendant guilty of a violation of the ordinance and it was not necessary that the court should in its finding describe in detail the facts which the evidence proved.

The court is of the opinion that the evidence sufficiently shows that the defendant was guilty of a breach of the peace and that of itself would justify the finding that was entered. The contention that there was a variation as to the name of the complaining witness and the name of the person assaulted is unfounded. The name of the complaining witness was originally Marjorie Merritt, the latter being the name of her own father. Apparently, her mother married a again and her second husband was named Lohrer, and the daughter, the complaining witness here, took the name of her stepfather and

so filed the complaint in the name of Marjorie Scherer.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

so filed the complaint in the name of Marjorie Webster.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

TAMBLYN, P.J. AND O'CONNOR, J. CONCUR.

229 - 27186

(26571)

LOUIS FRANGIPANE,

Appellee,

v.

FRANK AGOSTO,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

227 I.A. 597

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Louis Frangipane, brought suit in the Municipal Court of Chicago against Frank Agosto and Salvatore Agosto, doing business as Agosto Brothers, for $70.00.

The statement of claim is as follows:- That he intrusted seventh dollars ($70.00) to the defendant, defendant promising to hold said sum forthe plaintiff and to return it to him upon request. Plaintiff further alleges that though he has repeatedly requested the defendant to pay said sum, defendant has refused and still refuses so to do, to the damage of the plaintiff in the sum of seventy dollars ($70.00).

The defendant Frank Agosto, was duly served with summons, but he neither appeared, nor pleaded. There was no service on Salvatore Agosto.

At the trial the court entered an order that the suit be dismissed as to the defendant, Salvatore Agosto, and, in the same order, after reciting that the cause was tried without a jury, and evidence heard, and finding the issues against the defendant, Frank Agosto, assessed the plaintiff's damages in the sum of $70.00. Judgment was entered on that finding

320 - 2T166

LOUIS TRANGIYANE,

Appellee,

v.

FRANK AGOSTO,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Louis Trangiyane, brought suit in the Municipal Court of Chicago against Frank Agosto and Salvatore Agosto, doing business as Agosto Brothers, for $70.00.

The statement of claim is as follows:- That he instructed seventy dollars ($70.00) to the defendant, defendant promising to hold said sum for the plaintiff and to return it to him upon request. Plaintiff further alleges that though he has repeatedly requested the defendant to pay said sum, defendant has refused and still refuses so to do, to the damage of the plaintiff in the sum of seventy dollars ($70.00).

The defendant Frank Agosto, was only served with summons, but he neither appeared, nor pleaded. There was no service on Salvatore Agosto.

At the trial the court entered an order that the suit be dismissed as to the defendant, Salvatore Agosto, and, in the same order, after recitals that the cause was tried without a jury, and evidence heard, and finding the issues against the defendant, Frank Agosto, assessed the plaintiff's damages in the sum of $70.00. Judgment was entered on this finding

against Frank Agosto and from that judgment this appeal is taken.

What the evidence was which was introduced before the trial judge before whom the cause was tried, we do not know, as all that is brought to our attention is the common law record.

It is contended on the part of the defendant that the statement of claim was defective in that it set forth an indebtedness on the part of Frank Agosto and Salvatore Agosto doing business as Agosto Brothers, That contention, however, in untenable. The case is one of the fourth class and in such cases in the Municipal Court written pleadings are unnecessary. Further, the matter it involved cannot be considered for the first time in this court. Doggett, et al v. Rupert, 178 Ill. App. 230.

When Salvatore Agosto was dismissed out of the suit there then remained but one defendant, Frank Agosto, and it could not make any difference whether the judgment was entered against him in the name of Frank Agosto or as Agosto Brothers.

There being no material error in the record the judgment of the Municipal Court will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

against Frank Agosto and from that judgment this appeal is taken.

What the evidence was which was introduced before the trial judge before whom the cause was tried, we do not know, as all that is brought to our attention in the common law record.

It is contended on the part of the defendant that the statement of claim was defective in that it set forth an indebtedness on the part of Frank Agosto and Salvatore Agosto doing business as Agosto Brothers. That contention, however, is untenable. The case is one of the fourth class and in such cases in the Municipal Court written pleadings are unnecessary. Further, the matter is involved cannot be considered for the first time in this court. Bennett, et al v. Rupert, 172 Ill. App. 520.

When Salvatore Agosto was dismissed out of the suit there then remained but one defendant, Frank Agosto, and it could not make any difference whether the judgment was entered against him in the name of Frank Agosto or as Agosto Brothers.

There being no material error in the record the judgment of the Municipal Court will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

17 - 27118

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

SAMUEL JOSEPH (Impleaded),
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

227 I.A. 597

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Defendant asks for the reversal of a judgment finding him guilty of petty larceny, entered upon a plea of guilty. He was sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of $100.

It is argued here that it was error to enter judgment upon a plea of guilty without the defendant being fully advised by the court of the effects of his plea. While the original record filed by defendant failed to show such warning, the State has filed a supplementary record which shows that defendant was properly advised by the court of the effect of his plea of guilty. It follows therefore that the assignment of error in this respect is not supported by the record. People v. Harney, 276 Ill., 236.

It is next argued the record does not show the court examined witnesses in aggravation or mitigation of the defense. No bill of exceptions was preserved, and we will therefore presume that the court heard such evidence. People v. Pennington, 267 Ill., 45.

The judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

17 - 27112

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

SAMUEL JOSEPH (Impleaded),
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

Defendant asks for the reversal of a judgment finding him guilty of petty larceny, entered upon a plea of guilty. He was sentenced to imprisonment in the Chicago House of Correction for one year and to pay a fine of $100.

It is argued here that it was error to enter judgment upon a plea of guilty without the defendant being fully advised by the court of the effects of his plea. While the original record filed by defendant failed to show such admonition, the State has filed a supplementary record which shows that defendant was properly advised by the court of the effect of his plea of guilty. It follows therefore that the assignment of error in this respect is not supported by the record. People v. Hanson, 276 Ill., 250.

It is next argued the record does not show the court examined witnesses in aggravation or mitigation of the defense. No bill of exceptions was preserved, and we will therefore presume that the court heard such evidence. People v. Spaulding, 267 Ill., 49.

The judgment is affirmed.

AFFIRMED.

Dover and Matchett, JJ., concur.

2671a

96 - 27570

MAUDE BALDER,
Appellee,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 593

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $500 in an action alleging damages from a personal assault upon plaintiff by one of defendant's agents in furtherance of defendant's business.

The only occurrence witnesses are plaintiff and her son, who was about eleven years old at the time. Their story is substantially that plaintiff was a policy holder in defendant company; that premiums were collected about every week by a collector who called at her home; that upon the occasion in question Harry Gurvich, a collector, called and knocking at the door was told by plaintiff's son that his mother was not at home, whereupon Gurvich replied that he knew that she was at home and he was going to stop her insurance; that Gurvich then stepped out on the front porch, closing the door after him; that plaintiff, who was up stairs, heard this conversation and came down stairs, opened the door, stuck her head out and asked Gurvich what he meant by saying that the insurance would be stopped. The witnesses say that Gurvich replied by cursing and calling plaintiff a vile name. The boy testified that the door was half way open and his mother standing in the doorway, and that Gurvich took hold of the door and pulled it towards himself to close it, and that the edge of the door struck his mother's head, cutting it. Plaintiff's testimony is that Gurvich pushed the door inward

MAGGIE DAIGER,
Appellee,

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MOSURSKY
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $500 in an action alleging damages from a personal assault upon plaintiff by one of defendant's agents in furtherance of defendant's business.

The only eyewitnesses are plaintiff and her son, who was about eleven years old at the time. Their story is substantially that plaintiff was a policy holder in defendant company; that premiums were collected about every week by a collector who called at her home; that upon the occasion in question Harry Durvlok, a collector, called and knocking at the door was told by plaintiff's son that his mother was not at home, whereupon Durvlok replied that he knew that she was at home and he was going to stop her insurance; that Durvlok then stopped out on the front porch, closing the door after him; that plaintiff, who was up stairs, heard this conversation and came down stairs, opened the door, stuck her head out and asked Durvlok what he meant by saying that the insurance would be stopped. The witnesses say that Durvlok replied by cursing and calling plaintiff a vile name. The boy testified that the door was half way open and his mother standing in the doorway, and that Durvlok took hold of the door and pulled it towards himself to close it, and that the edge of the door struck his mother's head, cutting it. Plaintiff's testimony is that Durvlok pushed the door inward

striking her head; that Gurvich started away, but plaintiff pursued him and caught him by the coat collar; that he continued to attempt to break away and plaintiff was pulled down to the bottom of the porch stairs. The boy says that Gurvich got away, but his mother ran after him for about half a block and again grabbed him by the collar, but he broke loose. Plaintiff says she followed him only a few steps after he first broke away. Both witnesses testify that when plaintiff first opened the door Gurvich was standing upon the porch writing something in a book. At the time of the trial Gurvich was no longer employed by the defendant and did not testify.

The test of a master's liability under such circumstances is not whether a given act was done during the existence of the servant's employment, but whether it was done in the prosecution of the master's business. Klugman v. Sanitary Laundry Co., 141 Ill. App. 422. The doctrine of respondeat superior applies to acts performed by an agent within the scope of his employment. Kehoe v. Marshall Field & Co., 141 Ill. App. 140. It is concededly the rule that an employer is liable for the consequences of an assault by an employe on another only when the act of the employe is incidental to the employment, within its scope, and authorized by the employer." Grillo v. Oetting Bros. Ice Co., 27085, opinion of this court filed April 3, 1922; Neville v. Chicago & Alton R. Co., 210 Ill. App. 168.

It is evident that whatever part Gurvich took in the physical altercation with plaintiff was not in pursuance or furtherance of defendant's business, was not within the scope of his employment nor authorized by his employer. Both the occurrence witnesses agreed that after he had been told pplaintiff was not in the house, Gurvich quitted it, closing the front door and went on the porch to leave the premises. It is evident that plaintiff was angered by what was said concerning the insurance and got into

striking her head; that Gurvich started away, but plaintiff pursued him and caught him by the coat collar; that he continued to attempt to break away and plaintiff was pulled down to the bottom of the porch steps. The boy says that Gurvich got away, but his mother ran after him for about half a block and again grabbed him by the collar, but he broke loose. Plaintiff says she followed him only a few steps after he first broke away. Both witnesses testify that when plaintiff first opened the door Gurvich was standing upon the porch writing something in a book. At the time of the trial Gurvich was no longer employed by the defendant and did not testify.

The test of a master's liability under such circumstances is not whether a given act was done during the existence of the servant's employment, but whether it was done in the prosecution of the master's business. Kinyman v. Sanitary Laundry Co., 141 Ill. App. 422. The doctrine of respondeat superior applies to acts performed by an agent within the scope of his employment. Kehoe v. Marshallfield & Co., 141 Ill. App. 140. It is considered the rule that an employer is liable for the consequences of an assault upon employe or another only when the act of the employe is incidental to the employment, within its scope, and authorized by the employer." Jenkins v. Putting Bros. Inc Co., 270Ill, opinion of this court filed April 3, 1922; Beville v. Chicago & Alton R. Co., 230 Ill. App. 182.

It is evident that whatever part Gurvich took in the physical altercation with plaintiff was not in pursuance or furtherance of defendant's business, was not within the scope of his employment nor authorized by his employer. Both the countrence witnesses agreed that after he had been told plaintiff was not in the house, Gurvich quitted it, closing the front door and went on the porch to leave the premises. It is evident that plaintiff was angered by what was said concerning the insurance and got into

an altercation with Gurvich, in which she was the aggressor and during which her head came in contact with the door. The testimony tends to show that Gurvich was attempting to escape from plaintiff rather than to assault her. The collector had completed the business of his master when he had closed the front door and was starting to leave. Any subsequent altercation was entirely personal between the plaintiff and him and not incidental to his employment. Under such circumstances there can be no liability upon defendant, and the judgment is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Dever and Matchett, JJ., concur.

an altercation with Gurvich, in which she was the aggressor and during which her head came in contact with the door. The testimony tends to show that Gurvich was attempting to escape from plaintiff rather than to assault her. The collector had completed the business of his master when he had closed the front door and was starting to leave. Any subsequent altercation was entirely personal between the plaintiff and him and not incidental to his employment. Under such circumstances there can be no liability upon defendant, and the judgment is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Dever and Butchett, JJ., concur.

96 - 27570 FINDING OF FACT.

We find that the defendant's employe, Harry Gurvich, did not, in furtherance of defendant's business, wilfully, maliciously and wrongfully strike and by divers other violent means injure the plaintiff as alleged in plaintiff's declaration.

26 - 27970 FINDING OF FACT.

We find that the defendant's employe, Harry Gurvich, did not, in furtherance of defendant's business, wilfully, maliciously and wrongfully strike and by divers other violent means injure the plaintiff as alleged in plaintiff's declaration.

104 - 27578

Certiorari denied

2672a

AUGUSTA CZERWENKA,
Appellant,

vs.

VAUGHAN'S SEED STORE, a Corporation, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 597 4

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on defendant's promissory note for $5,500, claiming this amount with interest. Defense was a partial failure of consideration, which, upon trial by the court, was sustained and plaintiff's damages were reduced to $4,445, and judgment against defendant entered for this amount. Plaintiff appeals.

There is no serious dispute as to the facts. April 1, 1915, Frank Czerwenka leased from John M. and Florentine Kranz a four-story and basement building numbered 8-10-12 West Randolph street, in Chicago, for ten years at a fixed rental. April 14, 1915, Czerwenka sublet to Maison Richard Delicatessen Company the store and part of the basement of number 12, which was about one-half the frontage, from May 1, 1915, to April 30, 1920. Said sublease contained a rider as follows:

> "It is further understood and agreed that the parties of the second part have the option of renewing this lease under new conditions,* but the party of the first part has the privilege to cancel by giving three months notice in any year after April 30, 1920.
> In the event the rent is increased on the party of the first part the parties of the second part will pay their pro rata share."

October 31, 1918, the Maison Richard Delicatessen Company duly assigned its sub-lease to Kate Mueller, who there-

AUGUSTA CERNUSKA,
Appellant,

vs.

VAUGHAN'S GRAND STORE, a
Corporation, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MORAWETZ
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit on defendant's promissory note for $5,500, claiming this amount with interest. Defense was a partial failure of consideration, which, upon trial by the court, was sustained and plaintiff's damages were reduced to $4,448, and judgment against defendant entered for this amount. Plaintiff appeals.

There is no serious dispute as to the facts. April 1, 1915, Frank Cernuska leased from John K. and Florence Kraus a four-story and-basement building numbered 4-10-12 West Randolph street, in Chicago, for ten years at a fixed rental. April 14, 1915, Cernuska sublet to Marion Richard Delicatessen Company the store and part of the basement of number 12, which was about one-half the frontage, from May 1, 1915, to April 30, 1920. Said sublease contained a rider as follows:

> "It is further understood and agreed that the parties of the second part have the option of renewing this lease under new conditions," but the party of the first part has the privilege to cancel by giving three months notice in any year after April 30, 1920.
>
> In the event the rent is increased on the party of the first part the parties of the second part will pay their pro rata share."

October 31, 1916, the Marion Richard Delicatessen Company duly assigned its sub-lease to Kate Khalian, who there-

upon entered into possession of the premises. March 12, 1920, Augusta Czerwenka, plaintiff, as executrix and sole beneficiary of Frank Czerwenka, deceased, sold to Vaughan's Seed Store, defendant, the lease of April 1, 1915, from Kranz. This sale was by a contract reciting a consideration of $7,500, $2,000 in cash and the balance by note for $5,500. This note is the subject of this suit. In this contract plaintiff covenanted with defendant

> "that the lease of every tenant of said party of the first part now upon said premises or claiming under her will expire on the 30th day of April, 1920, or may be terminated on said day."

Defendant claims that plaintiff at this time knew of the possession by Kate Mueller of the store, and that she had an option for renewal; that defendant did not see the lease from plaintiff to the Delicatessen Company and by it assigned to Mueller, and had no notice of this outstanding option to renew. Kate Mueller gave due notice March 27, 1920, of her election to renew her lease. At this time defendant was occupying other premises under a lease expiring April 30, 1920, and in order to vacate the old premises and move into the new it was necessary to enter into negotiations with Kate Mueller to obtain her release of her renewal, and to this end defendant paid her $500. A further sum of $500 was paid for rent of the old building during the time defendant was compelled to hold over; also extra costs of moving were paid and attorney's fees incurred incident to the negotiations with Mrs. Mueller. It was not until May 10th that it was able to move into the new premises. Defendant claims that plaintiff breached her covenant in the contract as to all leases expiring or terminating April 30, 1920, as the optional renewal rights of Kate Mueller were then

upon entered into possession of the premises. March 12, 1920, Augusta Gerwenka, plaintiff, as executrix and sole beneficiary of Frank Gerwenka, deceased, sold to Vaughn's Food Store, defendant, the lease of April 1, 1915, from Kraus. This sale was by a contract reciting a consideration of $7,500, $2,000 in cash and the balance by note for $5,500. This note is the subject of this suit. In this contract plaintiff covenanted with defendant

"that the lease of every tenant of said party of the first part now upon said premises or claiming under her will expire on the 30th day of April, 1920, or may be terminated on said day."

Defendant claims that plaintiff at this time knew of the possession by Kate Mueller of the store, and that she had an option for renewal; that defendant did not see the lease from plaintiff to the Delicatessen Company and by it assigned to Mueller, and had no notice of this outstanding option to renew. Kate Mueller gave due notice March 27, 1920, of her election to renew her lease. At this time defendant was occupying other premises under a lease expiring April 30, 1920, and in order to vacate the old premises and move into the new it was necessary to enter into negotiations with Kate Mueller to obtain her release of her renewal, and to this end defendant paid her $500. A further sum of $300 was paid for rent of the old building during the time defendant was compelled to wait over; also extra costs of moving were paid and attorney's fees incurred incident to the negotiations with Mrs. Mueller. It was not until May 10th that it was able to move into the new premises. Defendant claims that plaintiff breached her covenant in the contract as to all leases expiring or terminating April 30, 1920, as the optional renewal rights of Kate Mueller were then

outstanding, and it claims these expenditures as damages to be allowed against plaintiff's claim on the note.

Plaintiff asserts that the alleged option for renewal is not a present demise and hence not a lease, and that in any event its terms are so uncertain and indefinite as to be void. It may be conceded that an option to renew is not a present demise or a lease, but that is aside from the crucial point. In construing these provisions we must allow for the circumstances of the transaction, the situation of the parties, the state of the thing granted and the end to be attained. Goodwillie Co. v. Commonwealth Co., 241 Ill. 42; Adams v. Gordon, 265 Ill. 87. It was clearly the intention of the parties to the Delicatessen Company lease to give it and its assignee an option for a renewal. The words "under new conditions" contemplated that the party of the first part might have to pay an increased rental, in which event the lessee agreed, if the option for renewal was exercised, to pay its pro rata share. Kate Mueller so understood it, as in the notice of her wish to exercise her option to renew she inquired if there was to be an increase of rent, saying she was willing to pay her proportionate share of such increase.

We are not persuaded that the existence of this outstanding and definite right in Kate Mueller to renew, which was known to plaintiff and not known to defendant, was not a breach of plaintiff's covenant as to the termination of all lessees' rights on April 30th, which was evidently made that defendant might be sure it could move without delay into the newly leased building upon the expiration of its right to possession of the premises then occupied by it. Construing the provision of the contract in the light of the circumstances of the parties and the end to be attained, the only reasonable conclusion is that plain-

outstanding, and it claims these expenditures as damages to be allowed against plaintiff's claim on the note.

Plaintiff asserts that the alleged option for renewal is not a present demise and hence not a lease, and that in any event its terms are so uncertain and indefinite as to be void. It may be conceded that an option to renew is not a present demise or a lease, but that is aside from the crucial point. In construing these provisions we must allow for the circumstances of the transaction, the situation of the parties, the state of the thing granted and the end to be attained. Doughtie Co. v. Commonwealth Co., 241 III. 42; Adams v. Brown, 265 III. 87. It was clearly the intention of the parties to the Delicatessen Company lease to give it and its assignee an option for a renewal. The words "under new conditions" contemplated that the party of the first part might have to pay an increased rental, in which event the lessee agreed, if the option for renewal was exercised, to pay its pro rata share. Into Shelley we understood it, as in the notice of her wish to exercise her option to renew she inquired if there was to be an increase of rent, saying she was willing to pay her proportionate share of such increase.

We are not convinced that the existence of this outstanding and definite right in Kate Shelley to renew, which was known to plaintiff and not known to defendant, was not a breach of plaintiff's covenant as to the termination of all lessees' rights on April 30th, which was evidently made that defendant might be sure it could move without delay into the newly leased building upon the expiration of its right to possession of the premises then occupied by it. Construing the provision of the contract in the light of the circumstances of the parties and the end to be attained, the only reasonable conclusion is that plain-

tiff's covenant in this respect was breached and that defendant was properly entitled to recover what it was damaged thereby.

Plaintiff very properly calls attention to the fact that the only plea on file at the time of the trial was the general denial, defendant's special plea of set-off claiming special damages having been withdrawn before the trial. As a general rule, a claim for special damages must be specially pleaded. Does the record here show reversible error in this regard? This is a Municipal court case, where formal pleadings are not always necessary. Defendant's affidavit of defense, after stating the nature of the defense, asserted that on account of the occupancy by Kate Mueller of a material portion of the premises, by reason of a lease to her which could not be terminated April 30th, defendant suffered loss and damages "as is more fully set forth in defendant's set-off filed herewith." The set-off purports to give these items in detail. We hold that this is a proper case for the application of the rule that while the withdrawal of the plea of set-off withdrew it as a pleading in the case, it still remained for the purposes of reference. Therefore, taken in connection with the reference to it in the affidavit of defense, there is sufficient to apprise plaintiff of all she needed to know as to the character and nature of the defense. If, after the claim of set-off was withdrawn, the affidavit of defense was thought not sufficient in particulars and details, these could have been supplied by an amendment incorporating so much of the special plea as was necessary. This view of the proper practice is supported by the decision in Shaughnessy v. Holt, 236 Ill. 485, and in principal in Vogrin v. American Steel Co., 263 Ill. 474.

The testimony was competent to justify the court in

tiff's covenant in this respect was breached and that defendant was properly entitled to recover what it was damaged thereby.

Plaintiff very properly calls attention to the fact that the only plea on file at the time of the trial was the general denial, defendant's special plea of set-off claiming special damages having been withdrawn before the trial. As a general rule, a claim for special damages must be specially pleaded. Upon the record here show reversible error in this regard. This is a Municipal court case, where formal pleadings are not always necessary. Defendant's affidavit of defense, after stating the nature of the defense, asserted that on account of the economy by Late Mailer of a material portion of the premises, by reason of a lease to her which could not be terminated April 30th, defendant suffered loss and damage "as is more fully set forth in defendant's set-off filed herewith." The set-off purports to give these items in detail. We hold that this is a proper case for the application of the rule that while the withdrawal of the plea of set-off withdrew it as a pleading in the case, it still remained for the purposes of reference. Therefore, taken in connection with the reference to it in the affidavit of defense, there is sufficient to apprise plaintiff of all are needed to know as to the character and nature of the defense. If, after the claim of set-off was withdrawn, the affidavit of defense was thought not sufficient in particular and detail, these could have been supplied by an amendment incorporating so much of the special plea as was necessary. This view of the proper practice is supported by the decision in Shumpanoky v. Hoin, 180 Ill. 488, and in principal in Jordin v. Montana Steel Co., 205 Ill. 474.

The testimony was competent to justify the court in

finding that defendant was damaged to the amount allowed. The parties must be held to their contractual undertakings and the trial court was right in holding that plaintiff's covenant to defendant was breached to its damage, and as there is no sufficient technical justification for reversal, the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

finding that defendant was damaged to the amount allowed. The parties must be held to their contractual undertakings and the trial court was right in holding that plaintiff's covenant to defendant was breached to its damage, and as there is no sufficient technical justification for reversal, the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

131 - 27605

2673

SEVENTEENTH WARD BUILDING AND LOAN ASSOCIATION et al.,
Appellees,

vs.

SARAH JULIUS et al. On Appeal of ELLEN L. McCLANE,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 597

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ellen L. McClane from an order denying the prayer of her petition that certain moneys, $806.74, in the hands of the receiver in a foreclosure proceeding, be paid to her.

The Seventeenth Ward Building and Loan Association, complainant, filed a bill to foreclose a trust deed. It alleged that the first defendant, Sarah Julius, had conveyed the security premises to Samuel Rubenstein by deed, in which he had assumed and agreed to pay the trust deed indebtedness. Testimony was taken by a master, who reported, and a decree was duly entered reciting the terms of the bond and trust deed, the amount of the indebtedness, and finding that Samuel Rubenstein was personally liable to pay the same by virtue of his assumption and agreement in the warranty deed to him; and it was ordered that if the property was not redeemed it should be offered for sale by the master, and if there was a deficiency a personal judgment should be entered against Samuel Rubenstain. This decree was entered December 24, 1919, and no appeal was taken therefrom. January 10, 1920, a receiver was appointed. April 25, 1921, there being no redemption, the premises were offered for sale and sold to the complainant for an amount which left a deficiency against Rubenstein for $1,163.75. May 6, 1921, said sale was approved and no appeal taken from the order of approval.

121 - 27605

SEVENTEENTH WARD BUILDING AND LOAN ASSOCIATION et al.,
Appellees,

vs.

SARAH JULIUS et al. On Appeal of ELLEN L. McGLANE,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE MORGANIM

DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ellen L. McGlane from an order denying the prayer of her petition that certain money, $806.74, in the hands of the receiver in a foreclosure proceeding, be paid to her.

The Seventeenth Ward Building and Loan Association, complainant, filed a bill to foreclose a trust deed. It alleged that the first defendant, Sarah Julius, had conveyed the security premises to Samuel Rubenstein by deed, in which he had assumed and agreed to pay the trust deed indebtedness. Testimony was taken by a master, who reported, and a decree was duly entered reciting the terms of the bond and trust deed, the amount of the indebtedness, and finding that Samuel Rubenstein was personally liable to pay the same by virtue of his assumption and agreement in the warranty deed to him; and it was ordered that if the property was not redeemed it should be offered for sale by the master, and if there was a deficiency a personal judgment should be entered against Samuel Rubenstein. This decree was entered December 24, 1919, and no appeal was taken therefrom. January 10, 1920, a receiver was appointed. April 25, 1921, there being no redemption, the premises were offered for sale and sold to the complainant for an amount which left a deficiency against Rubenstein for $1,152.76. May 6, 1921, said sale was approved and no appeal taken from the order of approval.

June 22, 1921, the petitioner, Ellen L. McClane, by her petition represented that December 24, 1920, Samuel Rubenstein had quit claimed his interest in the premises and had assigned his interest in the rents to her, and she asked that the money in the hands of the receiver be paid to her. Complainant answered the petition, setting forth the previous proceedings, and asked that the balance in the receiver's hands be paid to the complainant to apply on the deficiency against Rubenstein. After hearing the court entered an order approving the receiver's report and ordering that the balance of $806.74 in the receiver's hands be paid to the complainant in reduction of the deficiency due from Rubenstein; and denied the prayer of the McClane petition that the payment of the funds be made to her. The present appeal is from this last order.

The petitioner bases her attack on the order denying her petition upon alleged errors in the original decree of foreclosure and the report of the sale. She was not a party to those proceedings and she cannot now, by this appeal from a particular order, bring in review the entire proceedings. She seeks only the rents and cannot attack the decree in such a collateral matter. Sheahan v. Madigan, 275 Ill. 372; Donner v. Highway Comrs., 278 Ill., 189.

Even if petitioner could attack the decree in this proceeding, her points of criticism are baseless. There was sufficient to justify the finding in the decree that Rubenstein was personally liable for the mortgage indebtedness. The bill alleged that by virtue of the warranty deed he had assumed and agreed to pay this, and the master's report so found.

Sarah Julius properly assigned her stock to Rubenstein, duly noted on the books of the Association. Such shares are personal property and are transferrable. Section 10, chapter 32, 1921 Illinois Statute, Cahill. Other points are raised which

June 22, 1921, the petitioner, Ellen L. McClane, by her petition represented that December 24, 1920, Samuel Rubenstein had quit claimed his interest in the premises and had assigned his interest in the rents to her, and she asked that the money in the hands of the receiver be paid to her. Complainant answered the petition, setting forth the previous proceedings, and asked that the balance in the receiver's hands be paid to the complainant to apply on the deficiency against Rubenstein. After hearing the court entered an order approving the receiver's report and ordering that the balance of $806.74 in the receiver's hands be paid to the complainant in reduction of the deficiency due from Rubenstein; and denied the prayer of the McClane petition that the payment of the funds be made to her. The present appeal is from this last order.

The petitioner bases her attack on the order denying her petition upon alleged errors in the original decree of foreclosure and the report of the sale. She was not a party to those proceedings and she cannot now, by this appeal from a particular order, bring in review the entire proceedings. She seeks only the rents and cannot attack the decree in such a collateral matter. Sheehan v. Madigan, 275 Ill. 372; Downey v. Highway Comrs., 278 Ill., 180.

Even if petitioner could attack the decree in this proceeding, her points of criticism are baseless. There was sufficient to justify the finding in the decree that Rubenstein was personally liable for the mortgage indebtedness. The bill alleged that by virtue of the warranty deed he had assumed and agreed to pay this, and the master's report so found.

Sarah Julius properly assigned her stock to Rubenstein, duly noted on the books of the Association. Such shares are personal property and are transferable. Section 10, chapter 32, 1921 Illinois Statute, Cahill. Other points are raised which

are without merit. We prefer, however, to base our decision upon the rule that the petitioner cannot by this appeal question the decree or report of the master's sale, or other orders from which no appeal has been taken.

The order is affirmed.

AFFIRMED.

Dever and Hatchett, JJ., concur.

are without merit. We prefer, however, to base our decision upon the rule that the petitioner cannot by this appeal question the decree or report of the master's sale, or other orders from which no appeal has been taken.

The order is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

149 - 27625

MATT J. O'CONNELL,
Appellee,

vs.

F. LANDON, an Individual,
Doing Business Under the Name
of F. LANDON CARTAGE COMPANY,
and F. LANDON CARTAGE COMPANY,
a Corporation,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of an adverse judgment for $600 in an action brought by plaintiff to recover compensation for injuries alleged to have been inflicted by the negligent operation by defendants of an automobile.

The accident happened about six o'clock in the evening, in Chicago, at the point where Twelfth street runs west from Wabash avenue, a north and south street. At that point are the stub ends of two Twelfth street street car tracks. Cars coming from the west on the southerly track stop for westbound passengers and then switch over to the westbound or northerly track. It was a busy time of day and cars left there about two minutes apart. The jury properly could believe that plaintiff attempted to board a street car, but was unable to do so on account of the crowd; that at this time defendants' automobile came from the south on Wabash and turned west on Twelfth, running about eighteen or twenty miles an hour; that no warning was given to the people in Twelfth street who were waiting for a street car; that plaintiff looked up and saw the automobile coming, and that it struck him almost instantly after he saw it. The plaintiff sufficiently proved that the accident was caused by the negligent driving of defendants' automobile at an excessive speed and without warning, as charged in the declaration, and that

No. 2425

KATE J. O'CONNELL, Appellee,	
vs.	APPEAL FROM CHICAGO CITY COURT.
F. LAMSON, an individual, Doing Business Under the Name of F. LAMSON CARTAGE COMPANY, and F. LAMSON CARTAGE COMPANY, a Corporation, Appellants.	

MR. PRESIDING JUSTICE McCULLOUGH,

DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek the reversal of an judgment for $800 in an action brought by plaintiff to recover compensation for injuries alleged to have been inflicted by the negligent operation by defendants of an automobile.

The accident occurred about six o'clock in the evening, in Chicago, at the point where Twelfth street runs west from Wabash avenue, a north and south street. At that point the ninth [illegible] of two lively street car tracks. One coming from the east on the southerly track was for westbound passengers and then veering over to the westbound or northerly track. It was a rainy time of day and cars left there about the intersection. [illegible] could believe that plaintiff attempted to [illegible] was unable to do so on account of the crowd; that at the time defendants' automobile came [illegible] on Twelfth, running about eight [illegible] warning was given in the [illegible] for a street car; that plaintiff looked [illegible] coming, and that it struck him almost [illegible]. The plaintiff sufficiently proved that [illegible] the negligent driving of defendants' [illegible] speed and without warning, [illegible]

plaintiff was not guilty of any negligence contributing to the accident.

It is urged that there was no evidence which justified the court in admitting two ordinances of the City of Chicago which forbid a motor vehicle, overtaking any street car which is stopped for the purpose of taking on passengers, to pass or approach within ten feet of said car. While there was evidence tending to support defendants' theory that at the instant the automobile struck the plaintiff the street car which plaintiff intended to board was moving and not standing still, there was also evidence to the contrary. Plaintiff says that he was standing beside the steps of the street car when he saw the automobile coming about eight or ten feet away. It was for the jury to determine whether the ordinances were applicable to the facts, and it was entirely proper to admit them.

Criticism is made of an instruction with reference to damages. Counsel for defendants do not, however, give the instruction in full but only certain selected sentences. We have repeatedly refused to pass upon an instruction presented in this manner, as we are unable to judge of the effect of an instruction incompletely presented to us in bits. However, as we understand the instruction, it was not reversible error to give it.

It is said that the verdict is excessive, but with this we cannot agree. There is no sufficient reason to reverse and the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

plaintiff was not guilty of any negligence contributing to the accident.

It is urged that there was no evidence which justified the court in admitting the ordinances of the City of Chicago which forbid a motor vehicle, overtaking any street car which is stopped for the purpose of taking on passengers, to pass or approach within ten feet of said car. While there was evidence tending to support defendants' theory that at the instant the automobile struck the plaintiff the street car which plaintiff intended to board was moving and not standing still, there was also evidence to the contrary. Plaintiff says that he was standing beside the steps of the street car when he saw the automobile coming about eight or ten feet away. It was for the jury to determine whether the ordinances were applicable to the facts, and it was entirely proper to admit them.

Criticism is made of an instruction with reference to damages. Counsel for defendants do not, however, give the instruction in full but only certain selected sentences. We have repeatedly refused to pass upon an instruction presented in this manner, as we are unable to judge of the effect of an instruction incompletely presented to us in bits. However, as we understand the instruction, it was not reversible error to give it.

It is said that the verdict is excessive, but with this we cannot agree. There is no sufficient reason to reverse and the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

159 - 27635

SAMUEL RUDINOFF,
Appellee,

vs.

JOSEPH SIEGEL,
Appellant.

APPEAL FROM COUNTY COURT OF
COOK COUNTY.

227 I.A. 598

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This appeal challenges a judgment for $536 against defendant, entered upon a verdict.

The parties made a written contract in duplicate, whereby defendant agreed to do certain repair work upon a building belonging to plaintiff for an agreed price. Plaintiff asserts that because defendant failed to complete the work called for by the contract, he was obliged to have it done by other parties at an expense to himself, for which defendant should reimburse him. Defendant filed a set-off claiming something due for extra work. The jury did not, however, allow defendant's claim, but found for plaintiff in an amount which, it is strongly urged, is in excess of the amount permissible under plaintiff's evidence. The testimony was in sharp conflict and we would not feel disposed to disturb the verdict upon the questions of fact involved. However, we are not content to let the judgment stand for the following reason.

Concededly the contract was executed in duplicate, bearing the date October 6, 1919, and signed by both parties, each taking a copy. Upon the trial plaintiff undertook to introduce his copy, which had been subsequently altered by changing the date to November 8 and by adding, after a provision

190 - 47652

SAMUEL MUNIKOWY, Appellee,	APPEAL FROM COUNTY COURT OF COOK COUNTY.
vs.	
JOSEPH SIMONS, Appellant.	

MR. PRESIDING JUSTICE McSURLY
DELIVERED THE OPINION OF THE COURT.

This appeal challenges a judgment for $856 against defendant, entered upon a verdict.

The parties made a written contract in duplicate, whereby defendant agreed to do certain repair work upon a building belonging to plaintiff for an agreed price. Plaintiff asserts that because defendant failed to complete the work called for by the contract, he was obliged to have it done by other parties at an expense to himself, for which defendant should reimburse him. Defendant filed a set-off claiming compensation due for extra work. The jury did not, however, allow defendant's claim, but found for plaintiff in an amount which, it is strongly urged, is in excess of the amount permissible under plaintiff's evidence. The testimony was in sharp conflict and we would not feel disposed to disturb the verdict upon the questions of fact involved. However, we are not content to let the judgment stand for the following reason.

Admittedly the contract was executed in duplicate, bearing the date October 6, 1913, and signed by both parties, each taking a copy. Upon the trial plaintiff undertook to introduce his copy, which had been subsequently altered by changing the date to November 6 and by adding, after a provision

wherein the defendant undertook and agreed to start the work as soon as given possession, these words - "and to complete said work in twenty working days." It is admitted by plaintiff that these changes were made in his copy by an attorney, who testified that such changes were made by him after having "talked to both parties." Defendant denies that he ever consented to such changes and produced in evidence his copy of the contract as it was originally executed. The court permitted both copies to go to the jury, with the testimony of the lawyer who made the changes in plaintiff's copy.

Under certain circumstances parties may, by mutual agreement, change their written contract and be held thereto, but not in this case. As far as defendant was concerned there was no change, which means that the contract stood as originally made. It was error to admit plaintiff's altered copy and the testimony of the attorney who made the alterations, thus permitting the jury to predicate the liability of defendant upon a condition which was not a part of the contract of the parties.

The changes as to date and insertion of the obligation upon defendant to complete the work within twenty days were important in aiding plaintiff's claim based upon alleged delay of defendant. The jury should have considered only whether there was reasonable progress with the work.

For the error indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dever and Matchett, JJ., concur.

wherein the defendant undertook and agreed to start the work as soon as given possession, these words - "and to complete said work in twenty working days." It is admitted by plaintiff that these changes were made in his copy by an attorney, who testified that such changes were made by him after having "talked to both parties." Defendant denies that he ever consented to such changes and produced in evidence his copy of the contract as it was originally executed. The court permitted both copies to go to the jury, with the testimony of the lawyer who made the changes in plaintiff's copy.

Under certain circumstances parties may, by mutual agreement, change their written contract and be held thereto, but not in this case. As far as defendant was concerned there was no change, which means that the contract stood as originally made. It was error to admit plaintiff's altered copy and the testimony of the attorney who made the alterations, thus permitting the jury to predicate the liability of defendant upon a condition which was not a part of the contract of the parties.

The changes as to date and insertion of the obligation upon defendant to complete the work within twenty days were important in aiding plaintiff's claim based upon alleged delay of defendant. The jury should have considered only whether there was reasonable progress with the work.

For the error indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Dover and Marshall, JJ., concur.

169 - 27645

PAUL SCHROEDER, Doing Business as Paul Schroeder & Company, Appellant,

vs.

H. H. McKENZIE, Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 593

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought suit to recover real estate commissions on the sale of property owned by defendant. Upon trial by the court finding was against plaintiff, and judgment entered accordingly, from which he appeals.

It is essential for a recovery of broker's commissions to show that he was the procuring cause of the sale. Dickson v. Owens, 134 Ill. App. 561; Bowers v. Simpson, 160 Ill. App. 48; Wentworth v. Mann, 178 Ill. App. 621; Murawska v. Boeger, 219 Ill. App. 241; Rigdon v. More, 226 Ill. 382; Ogren v. Sundell, 220 Ill. App. 584.

Was plaintiff the procuring cause of the instant sale? We are of opinion the evidence shows he was not. Plaintiff apparently had the exclusive agency until about March 15, 1921, for the sale of the property in question, a house in Wilmette. Mr. T. W. Truitt, then living in Chicago, who subsequently purchased the property, first heard of it through a Mrs. Bordwell, a friend living in Wilmette. He told Mrs. Truitt to look at it. She went to Wilmette, having with her a description of the property which she had gotten from Mrs. Bordwell about the first of March. She was accompanied by Mrs. Tuttle, a real estate agent doing business in Chicago, who went with her to show her the house. They passed plaintiff's office in Wilmette, and one

PAUL SCHNEIDER, doing business as Paul Schneider & Company,
Appellant,

vs.

H. M. McCOLL,
Appellee.

APPEAL FROM SUPR. CT. [illegible]
OF [illegible].

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE [illegible].

Plaintiff, a real estate broker, brought suit to recover real estate commissions on the sale of property in [illegible] Court found by the court [illegible] title, and judgment [illegible].

It is asserted for a reversal of brokerage commissions to [illegible] the [illegible] of the sale. Dickson v. Cross, 194 [illegible] 100; [illegible] v. [illegible], 180 [illegible] 40; [illegible] v. [illegible], 174 [illegible] 121; [illegible] v. [illegible], 210 [illegible] 446; [illegible] v. [illegible], [illegible]; [illegible] v. [illegible], 220 [illegible] 134.

The [illegible] the proximate cause of the [illegible] sale? We are of opinion the evidence [illegible]. [illegible] apparently had the [illegible] for the sale of the property in controversy. [illegible] Mr. E. [illegible], [illegible] in [illegible], [illegible] showed the property, first [illegible] of it [illegible]. [illegible], a friend living in [illegible]. [illegible] The [illegible] to Chicago, [illegible] city which [illegible] Texas. She was accompanied by [illegible], [illegible] flying business in Chicago, [illegible] Moses. They [illegible] [illegible]

of them suggested that they should inquire there as to any other houses for sale. There they met a Mr. Huntley, associated with plaintiff, who offered to take them in his car to see the defendant's house, which was done, although Mrs. Truitt does not remember that they had any conversation there with Huntley about the house. She says she would have examined defendant's house without having been taken there by Mr. Huntley. Mrs. Truitt reported to her husband, who about two weeks thereafter went to Wilmette to examine the property, saw several signs on it, one sign reading, "Open for Inspection," and as the place was open, he inspected it. About the first of April the contract for the purchase of the property from Mr. McKenzie was signed. Plaintiff was not present and took no part in making the contract. Plaintiff never reported to the owner that Mrs. Truitt had been shown the property, and neither Mr. Truitt nor Mrs. Truitt had any dealings or communications with the plaintiff except upon the one occasion above mentioned. Defendant testified he had the property listed with other agents; that he paid a commission for the sale of the house, but not to the plaintiff.

It is a reasonable conclusion from this narrative that plaintiff was not the procuring cause of the sale. The buyer first heard of the property through other parties, and it would have been inspected and purchased by Truitt even if Mrs. Truitt had not called at the office of plaintiff. This being the case, it is hardly reasonable to say that plaintiff was the procuring cause of the sale.

The judgment of the Municipal court was right and it is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

of them suggested that they should inquire there as to any other houses for sale. There they met a Mr. Huntley, associated with plaintiff, who offered to take them in his car to see the defendant's house, which was done, although Mrs. Truitt does not remember that they had any conversation there with Huntley about the house. She says she would have examined defendant's house without having been taken there by Mr. Huntley. Mrs. Truitt reported to her husband, who about two weeks thereafter went to Wilmette to examine the property, saw several signs on it, one sign reading, "Open for inspection," and as the place was open, he inspected it. About the first of April the contract for the purchase of the property from Mr. McKenzie was signed. Plaintiff was not present and took no part in making the contract. Plaintiff never reported to the owner that Mrs. Truitt had been shown the property, and neither Mr. Truitt nor Mrs. Truitt had any dealings or communications with the plaintiff except upon the one occasion above mentioned. Defendant testified he had the property listed with other agents; that he paid a commission for the sale of the house, but not to the plaintiff.

It is a reasonable conclusion from this narrative that plaintiff was not the procuring cause of the sale. The buyer first heard of the property through other parties, and it would have been inspected and purchased by Truitt even if Mrs. Truitt had not called at the office of plaintiff. This being the case, it is hardly reasonable to say that plaintiff was the procuring cause of the sale.

The judgment of the municipal court was right and it is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

(2)

169 - 27645

PAUL SCHROEDER, Doing Business as Paul Schroeder & Company,
Appellant,

vs.

H. H. McKENZIE,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

ADDITIONAL OPINION ON REHEARING
BY MR. PRESIDING JUSTICE McSURELY.

We allowed the petition for rehearing in this cause as it was urged that we had not given sufficient consideration to the fact that the source of Mrs. Bardwell's information was plaintiff's sign on the premises. This is too remote to be the efficient and procuring cause of the sale. At most it was merely the cause of a cause. Marawsky v. Becker, 219 Ill. App. 241. After having given further careful consideration to the points made by plaintiff both in the briefs and petition for rehearing, we are not persuaded to change our former opinion and the judgment is affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

PAUL BORGWARDT, Solar Business as Paul Borgwardt & Company, Appellant,

vs.

H. H. McKEEVER,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

ADDITIONAL OPINION ON REHEARING

IN MR. PRESIDING JUSTICE MCSURELY.

We allowed the petition for rehearing in this cause as it was urged that we had not given sufficient consideration to the fact that the source of Mrs. Borkowski's information was plaintiff's sign on the premises. This is too remote to be the efficient and proximate cause of the sale. At most it was merely the cause of a cause. McKeever v. Barker, 218 Ill. App. 241. After having given further careful consideration to the points made by plaintiff both in the brief and petition for rehearing, we are not persuaded to change our former opinion and the judgment is affirmed.

AFFIRMED.

Dever and Hechtkopf, JJ., concur.

184 - 27660

JOSEPH E. THOREN,
Appellee,

vs.

WILLIAM B. WALRATH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 598

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff by his statement of claim alleged that defendant owed him a balance of the purchase price of certain real estate contracts sold by plaintiff to defendant. The affidavit of merits admitted $116.73 to be due. The amount in dispute was $500. Upon trial the jury was favorable to plaintiff's version and returned a verdict of $616.73. From the judgment for this amount defendant appeals.

Respective counsel have argued a number of matters involving details of accounts and statements. It would unduly extend this opinion to comment upon these. Having considered the various contentions, we are not convinced that the verdict of the jury was wrong.

In brief outline the transaction was as follows: Plaintiff is a contractor and builder of small homes and owned seven cottages in Chicago, which had been sold by him to seven different persons under installment contracts. In October or November, 1915, defendant bought plaintiff's interest in these contracts for $6,800, of which $6,300 was to be paid in cash and the disposition of the balance of $500 is the question in dispute.

Defendant testified that it was agreed he should retain this $500 for two years as a guaranty, contingent upon the persons obligated under the real estate contracts meeting

184 - 27860

JOSEPH E. THOMSEN,
Appellee,

vs.

WILLIAM R. WALBERT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2ST I.A. 398

MR. PRESIDING JUSTICE MORSHEIM
DELIVERED THE OPINION OF THE COURT.

Plaintiff by his statement of claim alleged that defendant owed him a balance of the purchase price of certain real estate contracts sold by plaintiff to defendant. The affidavit of merits admitted $116.75 to be due. The amount in dispute was $500. Upon trial the jury was favorable to plaintiff's version and returned a verdict of $616.75. From the judgment for this amount defendant appeals.

Respective counsel have argued a number of matters involving details of accounts and statements. It would unduly extend this opinion to comment upon these. Having considered the various contentions, we are not convinced that the verdict of the jury was wrong.

In brief outline the transaction was as follows: Plaintiff is a contractor and builder of small homes and owned seven cottages in Chicago, which had been sold by him to seven different persons under installment contracts. In October or November, 1916, defendant bought plaintiff's interest in these contracts for $6,500, of which $5,500 was to be paid in cash and the disposition of the balance of $500 is the question in dispute.

Defendant testified that it was agreed he should retain this $500 for two years as a guaranty, continuent upon the persons obligated under the real estate contracts meeting

their monthly installment payments promptly; that two of the obligors under the contracts defaulted within the two years, and the defendant was compelled to sell their property. Hence defendant says he is entitled to retain the $500 pursuant to the agreement between the plaintiff and himself. Plaintiff denies that there was any such agreement and claims that all of the $6,800 was to be paid unconditionally; that in December, when defendant made a payment of cash, plaintiff was first told defendant would hold back $500 to guarantee the contracts; that nothing had been said about this prior to that time. Plaintiff then told defendant, "I wanted all that was coming to me. I told him I would not stand it." In the following January defendant wrote plaintiff enclosing a statement in which he undertook to charge plaintiff's account with the item of $500 "deposit to guarantee contracts." Shortly thereafter plaintiff called at defendant's office and demanded that this $500 be paid. Plaintiff testified he called a number of times after this, demanding payment.

The variant stories of the witnesses, with the documents which it is said tend to support their respective claims, were considered and weighed by the jury, and we cannot say that its conclusion is against the greater weight of the evidence.

The claim of an account rendered is sufficiently met by the testimony of the plaintiff that he refused to accept defendant's version of the transaction between them or to admit defendant's right to withhold $500 as a contingent fund.

A number of points have been made asserting errors upon the trial. We have noted all of these, and while not approving of everything said or done upon the trial, we are of the opinion that no error occurred of sufficient importance to compel a reversal. The judgment is therefore affirmed.

AFFIRMED.

Dever and Matchett, JJ., concur.

their monthly installment payments promptly; that two of the obligors under the contracts defaulted within the two years, and the defendant was compelled to sell their property. Hence defendant says he is entitled to retain the $800 pursuant to the agreement between the plaintiff and himself. Plaintiff denies that there was any such agreement and claims that all of the $8,800 was to be paid unconditionally; that in December, when defendant made a payment of cash, plaintiff was first told defendant would hold back $800 to guarantee the contracts; that nothing had been said about this prior to that time. Plaintiff then told defendant, "I wanted all that was coming to me. I told him I would not stand it." In the following January defendant wrote plaintiff enclosing a statement in which he undertook to charge plaintiff's account with the item of $800 "amount to guarantee contracts". Shortly thereafter plaintiff called at defendant's office and demanded that this $800 be paid. Plaintiff testified he called a number of times after this,demanding payment.

The various stories of the witnesses, with the documents which it is said tend to support their respective claims, were considered and weighed by the jury, but we cannot say that its conclusion is against the greater weight of the evidence.

The claim of an account rendered is sufficiently met by the testimony of the plaintiff that he refused to accept defendant's version of the transaction between them or to pay defendant's right to withhold $800 as a contingent fund.

A number of points have been made according errors upon the trial. We have noted all of these, and while not approving of everything said or done upon the trial, we are of the opinion that no error occurred of sufficient importance to compel a reversal. The judgment is therefore affirmed.

AFFIRMED.

Dever and Ketchett, JJ., concur.

26782

203 - 27679

CLYDE R. MYERS,
Appellee,

vs.

NORTHWESTERN ELEVATED RAILROAD COMPANY and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 599

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff while a passenger on an elevated railway station platform of defendants was struck by a passing train, receiving injuries. He brought suit for compensation and upon trial had a verdict and judgment for $6,800. Defendants appeal.

In the counts of his declaration plaintiff alleged that while in the exercise of due care for his own safety, defendants caused the accident in question by various negligent acts, - general operation, speed, absence of guard rails, lights, warning and proper trainmen - which are not necessary to particularize, as the only argument presented by defendants for reversal is that plaintiff was injured because of his own negligence.

The accident occurred at the Howard street station in Chicago, where the elevated company operated trains propelled by electric trolley over tracks belonging to the Chicago, Milwaukee & St. Paul Railway Co. At this point the whole road bed is about fifty feet in width, elevation about sixteen or seventeen feet above the street level, resting on a fill between concrete retaining walls. The tracks at this point run virtually north and south. The east retaining wall was completed and the fill on the east side had been put in and the easterly track laid for some years before the date of the accident. The west wall was not fully completed and some of the westerly tracks still rested upon timber. The

205 - 8709

CLYDE R. EVANS, Appellee,	
vs.	
NORTHWESTERN ELEVATED RAILROAD COMPANY and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellees.	

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

SEPTIA. 1910

MR. PRESIDING JUSTICE MCSECKEY

DELIVERED THE OPINION OF THE COURT.

Plaintiff while a passenger on an elevated railway station platform, of defendants was struck by a passing train, receiving injuries. He brought suit for compensation and upon trial had a verdict and judgment for $[illegible]. Defendants appeal.

In the course of his declaration plaintiff alleged that while in the exercise of due care for his own safety, defendants caused the accident in question by various negligent acts, - general operation, [illegible], warning and proper training - which are not necessary to particularize, as the only argument presented is defendants' contention that plaintiff was injured because of his own negligence.

The accident occurred at the upward elevated station in Chicago, where the elevated company operated trains propelled by electric traction over tracks built in the [illegible], along the S. St. Paul Railway [illegible]. At this point [illegible] about fifty feet in width, elevation about [illegible] feet above the street level, resting on a fill between retaining walls. The tracks of the road run [illegible] with [illegible]. The east retaining wall was completed and the fill on the east side had been put in and the easterly track laid for some years before the date of the accident. The west wall was not fully completed and some of the westerly tracks still rested upon timber. The

station runs southerly from the south side of Howard avenue, which runs east and west. There are four tracks here. The west track was for freight; the next track east was used by south bound passenger trains; the third track was the main track for north bound trains; and the fourth track, being the last to the east, was also used for north bound elevated trains, although it was called a switch track or runabout. The station platform was between the third and fourth tracks and was about 280 feet long and nine feet four inches wide; it was three feet six inches higher than the rails, and its floor was about on a level with or a few inches higher than the platforms of the cars as they stood on the tracks alongside of it. A canopy ran along the platform supported by posts in the center. At the extreme north end of the platform a stairway five feet in width led down to the street level. The stairway was also covered by a canopy uniting with that of the platform, and was boarded up at the sides. From the east side of this stairway to the east edge of the station platform was two feet six inches; between the east side of the stairway and the east edge of the platform at or near the north edge of the platform was a post running up to and supporting the canopy. The distance from this post to the east edge of the platform was seventeen inches.

Howard avenue station was a terminus for certain trains which run no farther north. At the foot of an inclined track beginning at the north line of the street were yards where cars were laid up. Certain other trains after stopping at this station continued on north bound to Evanston or Wilmette. It was customary here to cut off cars from certain north bound trains and run them northward across Howard avenue and down the incline into the yards; also cars at this point were added to south bound

station was southerly from the south side of Howard avenue, which runs east and west. There are four tracks here. The west track was for freight; the next track east was used by south bound passenger trains; the third track was the main track for north bound trains; and the fourth track, being the last to the east, was also used for north bound elevated trains, although it was called a switch track or runaway. The station platform was between the third and fourth tracks and was about 300 feet long and nine feet four inches wide; it was three feet six inches higher than the rails, and its floor was about on a level with or a few inches higher than the platforms of the cars as they stood on the tracks alongside of it. A canopy ran along the platform supported by posts in the center. At the extreme north end of the platform a stairway five feet in width led down to the street level. The stairway was also covered by a canopy uniting with that of the platform, and was boarded up at the sides. From the east side of this stairway to the east edge of the station platform was two feet six inches; between the east side of the stairway and the west edge of the platform at or near the north edge of the platform was a post running up to and supporting the canopy. The distance from this post to the east edge of the platform was seventeen inches.

Howard avenue station was a terminus for certain trains which ran no further north. At the foot of an inclined track beginning at the north line of the street were yards where cars were laid up. Certain other trains after stopping at this station continued on north bound to Evanston or Wilmette. It was customary here to cut off cars from certain north bound trains and run them northward across Howard avenue and down the inclined line into the yards; also cars at this point were added to south bound

trains coming from Evanston and Wilmette. This cutting off of cars from north bound trains was done on the track east of the platform. The cars taken from north bound trains were the front cars, and the rear cars of such trains so cut in two were run down, crossed over and brought back on the south bound main track, where they were added to south bound trains. It was one of these rear cars detached from a north bound train and pushed north on the east track which, while passing the platform where he was, struck plaintiff.

Plaintiff, forty-five years old, lived in Evanston, and had alighted from a north bound train which went no farther than Howard avenue, and which arrived at the station on the track west of the platform about six o'clock in the evening of January 14, 1919. He was familiar with the surroundings, as he had been traveling between his home and his business by this way for a year and a half. Sometimes on alighting from a train whose terminus was at Howard avenue, he would proceed homeward by taking a north bound Evanston train from the same platform, or would go down the stairway at the north end of the platform and take a surface street car to Evanston. These surface cars came on Howard avenue from the west and their terminus on Howard, before returning to Evanston, was west of the elevated tracks. Plaintiff was in doubt at this time whether he would wait on the platform for a north bound elevated train or go down to the stairway at the north end and take a surface car to Evanston. He looked to the south from both sides of the platform, to see whether a train was coming which he might take, and saw none. He testified that he then went towards the north stairway, walking about a foot from the east edge of the platform, and had reached a point about four or five feet from the head of the stairway, when he

trains coming from Beaverton and Wilsonville. This cutting off of cars from north bound trains was done on the track east of the platform. The cars taken from north bound trains were the front cars, and the rear cars of such trains so cut in two were run down, crossed over and brought back on the south bound main track, where they were added to south bound trains. It was one of these rear cars detached from a north bound train and pushed north on the east track which, while passing the platform where he was, struck plaintiff.

Plaintiff, forty-five years old, lived in Beaverton, and had alighted from a north bound train which went no farther than Howard avenue, and which arrived at the station on the track west of the platform about six o'clock in the evening of January 14, 1919. He was familiar with the surroundings, as he had been traveling between his home and his business by this way for a year and a half. Sometimes on alighting from a train whose terminus was at Howard avenue, he would proceed to cross by taking a north bound Beaverton train from the same platform, or would go down the stairway at the north end of the platform and take a surface street car to Beaverton. These surface cars ran on Howard avenue from the west and built up into the town, before returning to Beaverton, was west [illegible] the tracks. Plaintiff was in doubt at this time whether he would walk on the platform for a north bound Beaverton train or go down the stairway at the north end and take a surface car to Beaverton. He looked to the south from both sides of the platform, to see whether a train was coming which he might take, and saw none. He testified that he then went towards the north stairway, taking about [illegible] feet from the east edge of the platform, and stopped a point about four or five feet from the east edge of the platform, when he

was struck from behind by a car passing on the east track, was knocked from the platform and fell to the ground four or five feet north of the end of the platform. The wheels of the train which struck him ran over his right leg.

The cars which struck plaintiff had been part of a north bound train which had pulled in and stopped at the east track shortly before the train from which plaintiff alighted stopped at the west side of the same platform. After the passengers had alighted from the train on the east track the first three cars were taken on north into the yards, leaving two rear coaches empty and without lights standing along the east side of the platform, the north end of the north coach being about 125 feet south of the north end of the platform. As soon as the first three cars were out of the way a motor car came in from the south, was coupled to the rear coach, and these three cars started to move north. The station platform was lighted with incandescent electric lights under the canopy and there is no evidence of insufficient light on the platform. One of plaintiff's witnesses testified that he could see these cars 150 feet away, and that from the north end of the platform he could see they were moving towards the witness. This was a busy hour of the evening. North bound trains were arriving at short intervals on both tracks, and cutting off and switching cars on these tracks were customary movements. Plaintiff was familiar with these conditions.

The testimony of two other witnesses tends, although very slightly, to corroborate plaintiff's story of the occurrence. Another of plaintiff's witnesses, however, testifies that he was within five or six feet of plaintiff when he was struck and saw the accident; that plaintiff reached the head of the stairs and took hold of the post or the southeast corner of the stair canopy, and was holding onto this canopy or the post, looking northward,

was struck from behind by a car passing on the east track, was knocked from the platform and fell to the ground four or five feet north of the end of the platform. The wheels of the train which struck him ran over his right leg.

The cars which struck plaintiff had been part of a north bound train which had pulled in and stopped at the east track shortly before the train from which plaintiff alighted stopped at the west side of the same platform. After the passengers had alighted from the train on the east track the first three cars were taken on north into the yards, leaving two rear coaches empty and without lights standing along the east side of the platform, the north end of the north coach being about 120 feet south of the north end of the platform. As soon as the first three cars were out of the way a motor car came in from the south, was coupled to the rear coach, and these three cars started to move north. The station platform was lighted with incandescent electric lights under the canopy and there is no evidence of insufficient light on the platform. One of plaintiff's witnesses testified that he could see these cars 180 feet away, and that from the north end of the platform he could see they were moving towards the station. This was a busy hour of the evening. North bound trains were arriving at short intervals on both tracks, and starting off and switching cars on these tracks were customary movements. Plaintiff was familiar with these conditions.

The testimony of two other witnesses tends, although very slightly, to corroborate plaintiff's story of the occurrence. Another of plaintiff's witnesses, however, testifies that he was within five or six feet of plaintiff when he was struck and saw the accident; that plaintiff reached the head of the stairs and took hold of the post or the southeast corner of the main canopy, and was holding onto this canopy or the post, looking northward,

when his right shoulder was struck by the train. This witness says that no part of the coach extended over the platform and that plaintiff's "shoulder must have been extending out in order to allow the train to hit him."

The only other witness who saw plaintiff struck was a switchman who was on the front end of the north car with a lighted lantern. He testified that when the front end of the car in which he stood was approaching the north end of the platform, plaintiff stepped out, took hold of the post by the stairway with his left hand, leaned out to the east and looked north; that he leaned out far enough that the front end of the car struck him across the shoulder or back, and his head broke a window in the front of the car. Witnesses testify that the cars were then moving eight or ten miles an hour.

There was also evidence tending to show that one standing at this corner of the platform, by leaning easterly and looking along Howard avenue, could see whether or not an Evanston surface car was on Howard avenue, and it is plausible that, as plaintiff was undecided whether to wait for a through north bound Evanston elevated train, or to proceed homeward by the surface car, he wished to ascertain before leaving the platform whether or not a surface car was at hand.

It was shown that the side of the particular car which struck plaintiff, standing on the track beside the platform at the point where the accident occurred, was five inches from the edge of the platform. There was a grab-handle attached to the front of the door which projected from the side of the car something less than four inches. The general testimony was that passing trains came as close to the east edge of the platform as they do at other stations - probably about three inches.

There was considerable evidence introduced by

when his right shoulder was struck by the train. This witness says that no part of the coach extended over the platform and that plaintiff's "shoulder must have been extending out in order to allow the train to hit him."

The only other witness who saw plaintiff struck was a watchman who was on the front end of the north car with a lighted lantern. He testified that when the front end of the car in which he stood was approaching the north end of the platform, plaintiff stepped out, took hold of the post by the stairway with his left hand, leaned out to the east and looked north; that he leaned out far enough that the front end of the car struck him across the shoulder or back, and his hand broke a window in the front of the car. Witnesses testify that the cars were then moving slight or ten miles an hour.

There was also evidence tending to show that one standing at this corner of the platform, by leaning easterly and looking along Howard avenue, could see whether or not an Evanston surface car was on Howard avenue, and it is plausible that, as plaintiff was undecided whether to wait for a through north bound Evanston elevated train, or to proceed northward by the surface car, he wished to ascertain before leaving the platform whether or not a surface car was at hand.

It was shown that the side of the particular car which struck plaintiff, standing on the track by the platform at the point where the accident occurred, was five inches from the edge of the platform. There is a sub-sill attached to the front of the door which projects from the side of the car something less than four inches. The general testimony was that passing trains come as close to the east edge of the platform as they do at other stations - probably about three inches.

There was considerable evidence introduced by

plaintiff tending to show that the east track was uneven, which would cause a passing train to oscillate or sway, and one witness testified that the upper part of the car as it passed projected over the platform. It is highly improbable, even if the conditions claimed by plaintiff were proven, that the car, starting from a standstill, five inches from the edge, could, in a distance of 125 feet, going eight or ten miles an hour, so project or sway over the platform as to strike a person thereon who was a foot from the edge. The greater weight of the evidence shows, however, that the east track was solid and well ballasted, straight and level, and neither rail higher than the other; that there was no unusual rocking or oscillation of the cars as they ran along the east side of the platform, and no part of the cars overhung or protruded over the edge. Photographs introduced in evidence showing the platform, cars and track, tend to prove this.

We are of the opinion that the greater weight of the evidence proves that the plaintiff, although fully acquainted with the surrounding situation and knowing the possibility of unlighted, empty cars being pushed past this point at frequent intervals at this time of evening, wishing to see whether or not a street car was available on which to continue his journey, leaned out from the easterly edge of the platform into the line of the movement of cars passing upon the east track, directly in the pathway of the approaching cars, and that he was struck by the front end of the car because he had put himself in this position of danger.

It is the plain duty of a passenger when not getting on or off a train, but while waiting upon the platform or engaged in walking upon it, to keep such a distance from the edge of it next to the rail that he will be beyond the reach of projections

plaintiff tending to show that the east track was uneven, which would cause a passing train to oscillate or sway, and one witness testified that the upper part of the car as it passed projected over the platform. It is highly improbable, even if the conditions claimed by plaintiff were proven, that the car, starting from a standstill, five inches from the edge, could, in a distance of 150 feet, going at 7 or 10 miles an hour, so project or sway over the platform as to strike a person thereon who was a foot from the edge. The greater weight of the evidence shows, however, that the east track was solid and well ballasted, straight and level, and neither left nor right of the other; that there was no unusual rocking, or oscillation of the cars as they ran along the east side of the platform, and no part of the cars overhung or projected over the edge. Photographs introduced in evidence showing the platform, cars and track, tend to prove this.

We are of the opinion that the verdict [illegible] the evidence proves the [illegible] standstill, which is fully [illegible] with the surrounding circumstances and shows the [illegible] of unlighted, empty cars later passed [illegible] at frequent intervals at this time of [illegible], [illegible] a street car was [illegible] jumped out from the [illegible] of the movement of cars [illegible] upon the [illegible] in the railway [illegible] by the fixed and [illegible] position of danger.

It is true [illegible] on or off a train, but while waiting [illegible] in waiting upon it, to keep some distance from the edge or [illegible] near to the rail that he will be beyond [illegible]

of on-coming trains. A railway company cannot be held liable for injury to a passenger who suffers himself to go beyond such a limit and is injured by a passing train. Such conduct is contributory negligence as a matter of fact. Among the many cases involving facts like those in the instant case, in which it was held there was no liability upon the defendant because the accident was caused by the conduct of the plaintiff in negligently placing himself in a dangerous position, are: Chicago, B. & Q. R. R. Co. v. Mahara, 47 Ill. App. 208; Chicago & E. I. R. R. Co. v. Weir, 91 Ill. App. 420; Matthews v. Penn. R. R. Co., 148 Pa. St. 491; Penn. R. R. Co. v. Bell, 122 Pa. St. 58; Louisville & N. R. R. Co. v. Glascow, 179 Ala. 251; D'Arcy v. Int. R. T. Co., 152 N. Y. S. 500; St. Louis & S. W. Ry. Co., v. Douglass, 175 S. W. 518; Hutchinson v. Boston & M. R. R., 219 Mass. 389; Dotson v. Erie R. R. Co., 68 N. J. L. 679.

We are convinced that the accident was caused by the negligent conduct of plaintiff and that with ordinary and due care for his own safety it would have been avoided; we must therefore reverse the judgment with a finding of fact.

REVERSED WITH FINDING OF FACT.

Dever and Matchett, JJ., concur.

of on-coming trains. A railway company cannot be held liable for injury to a passenger who suffers direct to go beyond such a limit and is injured by a passing train. Such conduct is contributory negligence as a matter of fact. Among the many cases involving facts like those in the instant case, in which it was held there was no liability upon the defendant because the accident was caused by the conduct of the plaintiff in negligently placing himself in a dangerous position, see: Chisamore, R. & A. R. R. Co. v. Adams, 67 Ill. App. 209; Chicago & E. R. R. Co. v. Kelly, 71 Ill. App. 420; Kellogg v. Chic. M. & St. P. Co., 148 Fed. 86. 401; Penn. R. R. Co. v. Hall, 132 Pa. St. 90; Louisville & N. R. R. Co. v. Gibson, 170 Ala. 221; Alter v. Int. R. Co., 182 N. Y. 92; Wells v. Long Island R. R. Co., v. Lowlace, 172 S. W. 218; Hutchinson v. Morton & K. R. R., 48 Kans. 38; Patten v. Erie R. Co., 81 N. J. L. 218.

We are convinced that the accidents are caused by the negligent conduct of plaintiff and that with ordinary care for his own safety it would have been avoided; we must therefore reverse the judgment with a finding of fact.

REVERSED WITH FINDING OF FACT.

Dever and Scheidt, JJ., concur.

203 - 27679 FINDING OF FACT.

We find as an ultimate fact that the proximate cause of the accident described in plaintiff's declaration and each count thereof was the negligent conduct of the plaintiff in placing himself in a position of danger, thus negligently directly contributing to the accident so described.

We find as an ultimate fact that the proximate cause of the accident described in plaintiff's declaration and book count thereof was the negligent conduct of the plaintiff in placing himself in a position of danger, thus negligently directly contributing to the accident or disaster.

2679a

234 - 27710

TIMOTHY CRIMMINGS,
Appellee,

vs.

HARRY A. COHN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 599

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing an action for replevin subsequently changed to trover, upon trial by the court had judgment for $400.

We are of the opinion this was error, and that the court should have found defendant not guilty.

The object of the replevin suit was a refrigerator which in the early part of March, 1921, was owned by and in the possession of Joseph Martins. March 22nd, plaintiff, who was doing business under the firm name of the Englewood Sausage Company, purchased in the name of this company the refrigerator from Martins and obtained a bill of sale of that date for the same, which was recorded in the recorder's office of Cook County. The refrigerator was left in the possession of Martins and not removed therefrom until July 1, 1921, when it was sold by defendant.

It appears that Martins had been buying meats from a concern represented by defendant and owed it therefor approximately $700. May 5, 1921, Martins executed a chattel mortgage to defendant, conveying with other property the refrigerator in question as security for advances to be made by defendant by way of extending credit for meats to be sold to Martins by defendant. Defendant at this time had no knowledge of any claims of ownership of anyone other than Martins, and nothing appeared upon the refrigerator

234 - 27710

TIMOTHY CRIMMINS,
Appellee,

vs.

HARRY A. COHN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

237 I.A. 239

MR. PRESIDING JUSTICE MORRISSEY
DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing an action for replevin subsequently changed to trover, upon trial by the court had judgment for $400.

We are of the opinion this was error, and that the court should have found defendant not guilty.

The object of the replevin suit was a refrigerator which in the early part of March, 1921, was owned by and in the possession of Joseph Martino. Harry Cohn, plaintiff, was doing business under the firm name of the Maplewood Storage Company, purchased in the name of it, secretly the refrigerator from Martino and obtained a bill of sale of that date for the same, which was recorded in the recorder's office of Cook County. The refrigerator was left in the possession of Martino and not removed therefrom until July 1, 1921, when it was sold by defendant.

It appears that Martino had been owing money from a concern represented by plaintiff, and used it refrigerator as partially $700. May 2, 1921, Martino executed a chattel mortgage to plaintiff, conveying with other property the refrigerator in question as security for advances to be made by defendant by way of extending credit for meats to be sold to Martino by plaintiff. Defendant at this time had no knowledge of any claims of ownership of anyone other than Martino, and nothing appeared upon the refrigerator

to indicate that Martins was not the owner. In the latter part of June Martins defaulted in payment of his indebtedness to defendant, who thereupon advertised for sale the articles mentioned in the chattel mortgage, including the refrigerator. The sale was held July 1, and the refrigerator was sold. It was not until about the time of the sale that defendant knew plaintiff claimed to own the refrigerator.

The integrity of the chattel mortgage is attacked and it is claimed that the beneficial interest therein is in parties other than defendant. None of these questions is of controlling importance. The chattel mortgage showed a valid conveyance to defendant which would entitle him to possession of the refrigerator provided plaintiff does not have a superior right. What superior right had plaintiff to the chattel which he had purchased but permitted his vendor to continue to possess for over three months? This is answered by section 23 of the Sales Act, chapter 121 a, Illinois Statute, Cahill.

> "Where a person having sold goods continues in possession of the goods *** the delivery or transfer by that person*** of the goods *** under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

In Ticknor v. McClelland, 84 Ill. 471, the court said:

> "The policy of the law in this state will not permit the owner of personal property to sell it, and still continue in the possession of it. Possession being one of the strongest evidences of title to personal property, if the real ownership is suffered to be in one, and the apparent ownership in another, the latter gains credit as owner, and is enabled to practice deceit upon mankind. It is the well established doctrine of this court that an absolute sale of personal property, where the possession is permitted to remain with the vendor, is fraudulent per se, and void as to creditors and purchasers."

This is the unvarying rule repeated in a large number of decisions in this state.

Plaintiff says that this rule does not apply when the

to indicate that Martin was not the owner. In the latter part of June Martin defaulted in payment of his indebtedness to defendant, who thereupon advertised for sale the articles mentioned in the chattel mortgage, including the refrigerator. The sale was held July 1, and the refrigerator was sold. It was not until about the time of the sale that defendant knew plaintiff claimed to own the refrigerator.

The integrity of the chattel mortgage is attacked and it is claimed it [illegible] "not a fraud upon creditors" because of other than defendant. Some of these conditions are controlling in-portance. The chattel mortgage showed a valid conveyance to defendant which would entitle it to possession of the refrigerator provided it itself does not have a superior right. The superior right had plaintiff to the chattel which he had overcome, but successfully by vendor in conditions to possess for over three months? This is answered by section 2a of the Sales Act, chapter 121 a, Illinois Statutes, 1921:

> "Where a person having a lien upon goods or interest in possession of the goods and the delivery or transfer by that person or of the goods or under any pledge, lien, or other disposition thereof, to any person receiving and paying for the same in the ordinary course of trade and without notice of the lien, shall have the same rights and be liable as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

In Hanson v. Modjeskiewicz, [illegible] Ill. [illegible] said:

> "The policy of the law is such that it will not permit the owner of personal property to [illegible] the possession of it. Possession [illegible] evidence of [illegible] property, [illegible] is subjected to [illegible] in one, [illegible] the latter [illegible] and in [illegible] to [illegible] demand upon [illegible]. It is the well established [illegible] this court [illegible] the [illegible] the possession is [illegible] with the vendee, [illegible] fraudulent [illegible]."

This is the controlling [illegible] of defendants in this case.

Plaintiff also that the sale does not [illegible] the

transfer of possession is impracticable on account of the size or character of the chattel sold, but this would not apply to the instant article which plaintiff, himself, testified could have been removed in one day.

The recording in the recorder's office of the bill of sale from Martins to plaintiff does not constitute notice. We know of no law providing for the recording of bills of sale of this character or that such recording constitutes notice. It seems to be decided otherwise in Gilbert v. National Cash Register, 176 Ill. 288.

In replevin plaintiff must recover upon the strength of his own title and under the circumstances of this case plaintiff can assert no right of possession superior to that of defendant; hence the judgment of the trial court was erroneous and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Dever and Matchett, JJ., concur.

transfer of possession is impracticable on account of the size or character of the chattel sold, but this would not apply to the instant article which plaintiff, himself, testified could have been removed in one day.

The recording in the recorder's office of the bill of sale from Martins to plaintiff does not constitute notice. We know of no law providing for the recording of bills of sale of this character or that such recording constitutes notice. It seems to be decided otherwise in Gilbert v. National Cash Register, 176 Ill. 588.

In replevin plaintiff must recover upon the strength of his own title and under the circumstances of this case plaintiff can assert no right of possession superior to that of defendant; hence the judgment of the trial court was erroneous and judgment of nil capiat is entered in this court.

REVERSED AND JUDGMENT OF NIL CAPIAT.

Dover and Matchett, JJ., concur.

255 - 27731

PALACE CLOAKS, SUITS AND MILLINERY, a Corporation, Appellee,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 599

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim alleged that two shipments of dresses were delivered to defendant for transportation and delivery from Chicago to certain parties in New York City, but that the deliveries to the consignees were never made. It sought to recover the value of the shipments and upon trial by the court was awarded $175, and from the judgment defendant appeals.

The briefs are not written in conformity with rule 19 of this court and the abstract is deficient in many respects. This has made it difficult for us readily to determine the merits of the points involved.

Two shipments are involved, one on September 16, 1919, consigned to Eisenberg & Summerfield, New York City, and another on September 17th to Abe Katz at New York City. By its affidavit of merits defendant asserted that claims were not filed within four months after it received the shipments or within four months after reasonable time for delivery had elapsed; that the shipment consigned to Katz was delivered to him and that plaintiff was not damaged to the amount claimed, which plaintiff had asserted was $196.

The receipt or bill of lading reciting that the carrier received the goods in apparent good order is prima facie

586 - 27783

PALACE GARAGE, SUITS AND MILLINERY, a Corporation,
Appellee,

vs.

AMERICAN RAILWAY EXPRESS COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim alleged that two shipments of dresses were delivered to defendant for transportation and delivery from Chicago to certain parties in New York City, but that the deliveries to the consignees were never made. It sought to recover the value of the shipments and upon trial by the court was awarded $175, and from the judgment defendant appeals.

The briefs are not written in conformity with rule 12 of this court and the abstract is defective in many respects. This has made it difficult for us readily to determine the merits of the points involved.

Two shipments are involved, one on September 15, 1919, consigned to Blumberg & Summerfield, New York City, and another on September 17th to Abe Lurie at New York City. By its affidavit of merits defendant asserted that claims were not filed within four months after it received the shipments or within four months after reasonable time for delivery and claims; that the shipment consigned to Lurie was delivered to him and that plaintiff was not damaged to the amount claimed, which plaintiff has asserted was $125.

The receipt or bill of lading recites that the carrier received the goods in apparent good order i- <u>[illegible]</u>

proof of that fact. I. C. R. R. v. Cobb et al., 72 Ill. 148.

The defendant's receipts issued for the two shipments and what is called the "Official Express Classification" on file with the Interstate Commerce Commission require a shipper as a condition precedent to recover to file a claim in writing on each shipment within four months after delivery of the respective shipments or within four months after a reasonable time for delivery of the respective shipments has elapsed. Defendant asserts that claims for the alleged loss of the shipments in question were not filed within the prescribed time. It was shown that a reasonable time to move a shipment from Chicago to New York City would be four days. There is controversy as to the time that a claim was made on the Katz shipment, but the trial court was justified in concluding that the claim was duly made by plaintiff's letter of December 1, 1919, which was within the four months.

The claim for the Eisenberg shipment was filed in March, 1920, which was after the four months, hence there can be no allowance to plaintiff of this claim.

In defendant's replies to plaintiff's claim and demand for settlement on account of the failure to deliver the Katz shipment the refusal to settle was based upon the asserted failure of the shipper to file his claim within the time required by the receipt. Non-delivery to Katz was in effect admitted. Having thus taken its position defendant will not be allowed upon the trial to change this or to mend its hold. The Cary Maple S. Co. v. The Pierre Viau M. Co., 173 Ill. App.93.

Testimony for the plaintiff, by its general manager and buyer, was that the value of the Katz goods was $106, and of the Eisenberg shipment $90. Rather than return this case for another trial, we shall reverse the present judgment and enter judgment

proof of that fact. *I. C. R. R. v. Goth et al.*, 72 III. 148.

The defendant's receipts issued for the two shipments and what is called the "Official Express Classification" on file with the Interstate Commerce Commission require a shipper as a condition precedent to recover to file a claim in writing on each shipment within four months after delivery of the respective shipments or within four months after a reasonable time for delivery of the respective shipments has elapsed. Defendant asserts that claims for the alleged loss of the shipments in question were not filed within the prescribed time. It was shown that a reasonable time to move a shipment from Chicago to New York City would be four days. There is controversy as to the time that a claim was made on the Rats shipment, but the trial court was justified in concluding that the claim was duly made by plaintiff's letter of December 1, 1919, which was within the four months.

The claim for the Blanchery shipment was filed in March, 1920, which was after the four months, hence there can be no allowance to plaintiff of this claim.

In defendant's replies to plaintiff's claim and demand for settlement on account of the failure to deliver the Rats shipment the refusal to settle was based upon the asserted failure of the shipper to file his claim within the time required by the receipt. Non-delivery to Rats was in effect admitted. Having thus taken its position defendant will not be allowed upon the trial to change this or to rend its hold. *The Gary Works S. Co. v. The Pierce Elam E. Co.*, 177 Ill. App.93.

Testimony for the plaintiff, by its general manager and buyer, was that the value of the Rats goods was $106, and of the Blanchery shipment $90. Rather than return this case for another trial, we shall reverse the present judgment and enter judgment

here against defendant for $106, the value of the Katz shipment; each party to be taxed with its own costs of this appeal.

REVERSED AND JUDGMENT HERE FOR $106.

Dever and Hatchett, JJ., concur.

Here against defendant for $106, the value of the Kats shipment; each party to be taxed with its own costs of this appeal.

REVERSED AND JUDGMENT HERE FOR $106.

Dover and Matchett, JJ., concur.

26805

19 - 26805

J. C. I. McGRATH,
Defendant in Error,

vs.

ADAMS EXPRESS COMPANY,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

227 I.A. 599

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment of the Municipal court of Chicago entered December 5, 1917.

Plaintiff brought an action in the trial court to recover damages to an automobile as the result of a collision with an automobile truck owned by the defendant. December 8, 1920, an ex parte verdict and judgment were entered in the cause in favor of the plaintiff for $193.72. December 10, 1920, defendant filed its motion to vacate the judgment. The trial Judge ruled that he would vacate the judgment and verdict and permit a defense upon the merits upon condition that defendant deposit with the clerk of the court the sum of $200 to secure the payment of any judgment that might be rendered in the cause. He also ruled that in lieu of the cash deposit defendant might file a bond with a reliable bonding company as surety. Thereafter defendant's counsel brought into court $200 and presented a form of order which recited:

> "This day comes Charles B. Elder, attorney for the Adams Express Company, and presents in open court the sum of two hundred dollars ($200.)"

In the trial court the attorney for the plaintiff contended that the order should read:

> "This day comes the Adams Express Company, by Charles B. Elder, its attorney."

10 - 22805

I. C. I. McGRATH, Defendant in Error,	
vs.	ERROR TO MUNICIPAL COURT OF CHICAGO.
ADAMS EXPRESS COMPANY, Plaintiff in Error.	

MR. JUSTICE BRYAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment of the Municipal court of Chicago entered December 8, 1917.

Plaintiff brought an action in the trial court to recover damages to an automobile as the result of a collision with an automobile truck owned by the defendant. December 8, 1920, on a jury verdict and judgment were entered in the cause in favor of the plaintiff for $153.72. December 16, 1920, defendant filed its motion to vacate the judgment. The trial judge ruled that he would vacate the judgment and verdict and permit a defense upon the merits upon condition that defendant deposit with the clerk of the court the sum of $100 to secure the payment of any judgment that might be rendered in the cause. He also ruled that in lieu of the cash deposit defendant might file a bond with a reliable bonding company as surety. Thereafter defendant's counsel brought into court $200 and presented a form of order which recited:

> "This day come Charles S. Lider, attorney for the Adams Express Company, and presents in open court the sum of two hundred dollars ($200.)"

In the trial court the attorney for the plaintiff contended that the order should read:

> "This day come the Adams Express Company, by Charles S. Lider, its attorney."

The trial Judge held that the order should be modified as suggested by plaintiff's attorney, which counsel for defendant refused to do, and the court overruled the motion to vacate the judgment.

It is argued that an affidavit in support of the motion to vacate the judgment shows that a judgment had been entered without fault or negligence on the part of the defendant or its attorney. The affidavit filed for the defendant shows that the attorney relied upon the Municipal court record for information as to the time when the case was to be set for trial, and copies of this publication for December 6th and 7th were attached to the affidavit. The affidavit on behalf of plaintiff, however, shows that the case appears in the Municipal court record as listed under its right number, 492319, but entitled MacGrath v. Maether, the only error in the title being in the name of the defendant.

An affidavit filed for the plaintiff recites that May 25, 1920, the case was continued by agreement until September 28, 1920; that on the latter date it was called and no one answered the call on behalf of defendant; that on this date it was continued until December 7, 1920, upon which date it was again called and set for December 8th; and that no one answered for defendant when the case was called December 8, 1920.

We are not ready to say on the record before us that the action of the trial Judge and that of counsel for plaintiff constituted "a trap for the unwary." There is much argument in the briefs of counsel touching the question of whether defendant's counsel was in any degree at fault, or whether by reasonable diligence he could have been apprised of the fact that the case was set for trial on December 8, 1920. There does not seem to be any dispute that on May 25, 1920, the case was continued by agreement

The trial judge held that the order should be modified as suggested by plaintiff's attorney, which counsel for defendant refused to do, and the court overruled the motion to vacate the judgment.

It is argued that an affidavit in support of the motion to vacate the judgment shows that a judgment had been entered without fault or negligence on the part of the defendant or its attorney. The affidavit filed for the defendant shows that the attorney relied upon the Municipal court docket for information as to the time when the case was to be set for trial, and copies of this publication for December 6th and 7th were attached to the affidavit. The affidavit on behalf of plaintiff, however, shows that the case appears in the Municipal court docket as listed under its right number, 63232, but entitled Kaufrath v. Kaufrath, the only error in the title being in the name of the defendant.

An affidavit filed for the plaintiff recites that May 28, 1930, the case was continued by agreement until September 28, 1930; that on the latter date it was called and no one answered the call on behalf of defendant; that on this date it was continued until December 7, 1930, upon which date it was again called and set for December 8th; and that no one answered for defendant when the case was called December 8, 1930.

We are not ready to say on the record before us that the action of the trial judge and that of counsel for plaintiff constituted "a trap for the unwary." There is much argument in the briefs of counsel touching the question of whether defendant's counsel was in any degree at fault, or whether by reasonable diligence he could have been apprised of the fact that the case was set for trial on December 8, 1930. There does not seem to be any dispute that on May 28, 1930, the case was continued by agreement

until September 28, 1920, and that on the latter date, in the absence of defendant, it was set for trial for December 7, 1920. The trial court did, however, grant a motion to vacate, and we do not believe the terms imposed were either onerous or unreasonable.

In the case of Hovey v. Middleton, 56 Ill. 468, the Supreme court said:

> "The power of setting aside defaults, as a general rule is a discretionary power, and the court exercising it may impose upon the party guilty of laches such terms as the court deems equitable and just under all the circumstances, and its action will not be reviewed in the Appellate court. The terms imposed in this instance by the court, as a condition upon which the appellants should be allowed to plead to the merits of the action, were not unreasonable. It was a proper exercise of that discretionary power with which the court is clothed."

In that case the trial court set aside a default judgment upon condition that defendant would pay all costs to the date of the judgment and deposit in court the amount thereof. Burhans v. Village of Norwood Park, 138 Ill. 147.

In allowing the motion to vacate the judgment the trial court acted reasonably and fairly, but defendant's counsel insists that it was not reasonable to require the deposit of the money in the name of Adams Express Company, the defendant, rather than in the name of the attorney. We can see no merit in this contention. There were only two parties to the suit - the plaintiff and the defendant. Obviously the order, if it was to have effect at all, was to operate upon the parties to the litigation. While it may be true, as contended, that the attorney was desirous of depositing his own money to protect his client, in the event of judgment against it, this fact in and of itself did not require the trial Judge to enter a form of order drawn to meet the exigencies of the attorney's relations with his client.

The judgment of the Municipal court is affirmed.

McSurely, P. J., and Matchett, J., concur. AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

until September 26, 1930, and that on the latter date, in the absence of defendant, it was set for trial for December 7, 1930. The trial court did, however, grant a motion to vacate, and we do not believe the terms imposed were either onerous or unreasonable.

In the case of Hovey v. Middleton, 32 Ill. 465, the Supreme court said:

> "The power of setting aside defaults, as a general rule is a discretionary power, and the court exercising it may impose upon the party guilty of judging such terms as the court deems equitable and just under all the circumstances, and its action will not be reversed in the Appellate court. The terms imposed in this instance by the court, as a condition upon which the appellants should be allowed to plead to the merits of the motion, were not unreasonable. It was a proper exercise of that discretionary power with which the court is clothed."

In that case the trial court set aside a default judgment upon condition that defendant would pay all costs to the date of the judgment and deposit in court the amount thereof. Brylane v. Village of Harwood Park, 138 Ill. 167.

In allowing the motion to vacate the judgment the trial court acted reasonably and fairly, but defendant's counsel insists that it was not reasonable to require the deposit of the money in the name of Alms Express Company, the defendant, rather than in the name of the attorney. We can see no merit in this contention. There were only two parties to the suit - the plaintiff and the defendant. Obviously the order, if it was to have effect at all, was to operate upon the parties to the litigation. While it may be true, as contended, that the attorney was desirous of depositing his own money to protect his client, in the event of judgment against it, this fact in and of itself did not require the trial judge to enter a form of order frame to meet the exigencies of the attorney's relations with his client.

The judgment of the Municipal court is affirmed.

McSurely, P. J., and Matchett, J., concur. AFFIRMED.

210 - 27167

26820

GEORGE P. TAYLOR,
Appellee,

vs.

NATIONAL RAILWAYS ADVERTISING COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 599

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court against the defendant for the sum of $5372.80. Defendant seeks here to reverse this judgment.

Two actions which were brought by plaintiff against defendant were consolidated in the Municipal court. Defendant's claim of right to a setoff against the claims of plaintiff was denied in the trial court. Plaintiff's claims are founded upon his assertion that he was employed by defendant as an advertising solicitor and that at the time he left the defendant's employ the latter was indebted to him for commissions. It was shown on the trial that plaintiff was so employed from June, 1911, to September, 1912; that he was to receive for his services 10 per cent of all sums collected upon contracts obtained by him; that subsequently plaintiff was again employed by defendant as a solicitor on a 15 per cent commission basis; that this last employment began on September 15, 1912, and ended about September 1, 1916; that during this latter period the plaintiff obtained contracts upon which he was entitled to a total sum of $9788.74, and that during the same period he had been paid by defendant $10,471.85. It was stipulated that in addition to the contracts above referred to other contracts were entered into between the defendant and other parties described in the stipulation as Forest Park, Midway Gardens and Bunte Bros., "concerning which contracts the parties

GEORGE P. TAYLOR,
Appellee,

vs.

NATIONAL RAILWAY ADVERTISING COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DENNIS DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal court against the defendant for the sum of $6272.80. Defendant seeks here to reverse this judgment.

Two actions which were brought by plaintiff against defendant were consolidated in the Municipal court. Defendant's claim of right to a setoff against the claims of plaintiff was denied in the trial court. Plaintiff's claims are founded upon his assertion that he was employed by defendant as an advertising collector and that at the time he left the defendant's employ the latter was indebted to him for commissions. It was shown on the trial that plaintiff was so employed from June, 1911, to September, 1912; that he was to receive for his services 10 per cent of all sums collected upon contracts obtained by him; that subsequently plaintiff was again employed by defendant as a collector on a 15 per cent commission basis; that this last employment began on September 15, 1921, and ended about September 1, 1925; that during this latter period the plaintiff obtained contracts upon which he was credited to a total sum of $8756.74, and that during the same period he had been paid by defendant $10,471.[illegible]. It was stipulated that in addition to the contracts above referred to other contracts were entered into between the defendant and other parties described in the stipulation as Forest Park, Grayslandons and Lake Bros., "concerning which contracts the plaintiff

hereto make no agreement whatsoever. We leave those questions open." As to these latter contracts the only one in dispute is the Bunte Bros. contract, upon which plaintiff says he is entitled to a commission amounting to $5938.80. This latter is one of the two main disputed questions in the case. The other concerns a question as to whether $50 a week, which was allowed to plaintiff by defendant, is, under the evidence, to be charged against commissions due plaintiff under his contract for commissions. The Bunte Bros. contract with defendant for advertising was dated September 9, 1914, and was to be effective January 1, 1915, for a period of 60 months thereafter, subject to the right reserved to Bunte Bros. to cancel the contract by written notice on or before December 1, 1916. The contract gave Bunte Bros. advertising space in 686 cars operated on two elevated railways in Chicago. Evidence was introduced on behalf of the defendant to the effect that during the month of November, 1916, at a conference between defendant's officers and a representative of Bunte Bros., the latter stated that his principal intended to exercise its right to cancel the contract; that during this conference it was agreed between the persons present that Bunte Bros.' right to cancel the contract would be extended until January 1, 1917, a period of thirty days. This oral understanding was confirmed by a letter from defendant to Bunte Bros., dated November 9, 1916, and on December 29, 1916, Bunte Bros., by a letter to defendant stated that the latter desired to exercise its right to terminate the contract. January 5, 1917, Bunte Bros. entered into a new written contract with defendant for advertising space in 1033 cars in four elevated railways operated in Chicago, including the two covered by the contract of September 9, 1914. The new contract was to run for a period of thirty months from January 1, 1917, and it provided for the cancellation

hereto make no agreement whatsoever. We leave those questions open." As to these latter contracts the only one in dispute is the Burte Bros. contract, upon which plaintiff says he is entitled to a commission amounting to $8836.80. This latter is one of the two main disputed questions in the case. The other concerns a question as to whether $30 a week, which was allowed to plaintiff by defendant, is, under the evidence, to be charged against commissions due plaintiff under his contract for commissions. The Burte Bros. contract with defendant for advertising was dated September 7, 1914, and was to be effective January 1, 1915, for a period of 60 months thereafter, subject to the right reserved to Burte Bros. to cancel the contract by written notice on or before December 1, 1916. The contract gave Burte Bros. advertising space in 550 cars operated on two elevated railways in Chicago. Evidence was introduced on behalf of the defendant to the effect that during the month of November, 1916, at a conference between defendant's officers and a representative of Burte Bros., the latter stated that his principal intended to exercise its right to cancel the contract; that during this conference it was agreed between the persons present that Burte Bros.' right to cancel the contract could be extended until January 1, 1917, a period of thirty days. This oral understanding was confirmed by a letter from defendant to Burte Bros., dated November 6, 1916, and on December 14, 1916, Burte Bros., by a letter to defendant stated that the latter desired to exercise its right to terminate the contract. January 1, 1917, Burte Bros. entered into a new written contract with defendant for advertising space in 1000 cars in four elevated railways operated in Chicago, including the two covered by the contract of September 7, 1914. The new contract was to run for a period of thirty months from January 1, 1917, and it provided for the cancellation

of the contract of September 9, 1914, and also of a contract dated January 17, 1916, for advertising space for a period of sixty months in 355 cars upon two elevated railways not included in the contract of September 9, 1914.

The contract of January 5, 1917, provided for advertising space in 1033 cars. The earlier contracts combined provided for space in 1041 cars. So far as we are informed in the briefs of appellant there was no substantial difference between the contract of January 5, 1917, and the sum of the two earlier contracts either with reference to the number of cars in which space was given to Bunte Bros., or in the time the contracts were to remain in force.

The trial court held as a proposition of law that the contract of September 9, 1914, was not cancelled by the new arrangement made on January 5, 1917; that the latter constituted a continuation or modification of the original contract "made in conformity with, and not in derogation of, the terms of the original Bunte Bros. contract." It is our opinion that this holding of the trial court was not erroneous. The new arrangement did not make such a material change in the contractual relations between the parties as would authorize a holding that the plaintiff was thereby deprived of his right to commissions earned by him when he procured the contract of September 9, 1914. The new arrangement fixes the same rate per car for advertising space as was provided in the original contract; and such difference as was provided in the modified contract for the time during which advertising was to be had in the cars was not so material as to thereby permit the defendant, without plaintiff's consent, to so materially affect plaintiff's right to commission under his contract. The evidence gives much basis for the argument that the new contract was entered into for the purpose of defeating

of the contract of September 9, 1914, and also of a contract dated January 17, 1916, for advertising space for a period of sixty months in 358 cars upon two elevated railways not included in the contract of September 9, 1914.

The contract of January 6, 1917, provided for advertising space in 1033 cars. The earlier contracts combined provided for space in 1041 cars. So far as we are informed in the briefs of appellant there was no substantial difference between the contract of January 5, 1917, and the sum of the two earlier contracts either with reference to the number of cars in which space was given to Burte Bros., or in the time the contracts were to remain in force.

The trial court held as a proposition of law that the contract of September 9, 1914, was not cancelled by the new arrangement made on January 5, 1917; that the latter constituted a continuation or modification of the original contract "made in conformity with, and not in derogation of, the terms of the original Burte Bros. contract." It is our opinion that this holding of the trial court was not erroneous. The new arrangement did not make such a material change in the contractual relations between the parties as would authorize a finding that the plaintiff was thereby deprived of his right to cancellation accrued by him when he procured the contract of September 9, 1914. The new arrangement fixed the same rate per car for advertising space as was provided in the original contract; and no difference or was provided in the modified contract for the time during which advertising was to be had in the cars nor so material as to thereby permit the defendant, without the plaintiff's consent, to materially affect plaintiff's right to consideration in the contract. The evidence gives much basis for the argument that the new contract was entered into for the purpose of defeating

plaintiff's right to commissions. Without attempting to refer here to all the evidence touching this question, we are of opinion that the trial court did not err in holding that the plaintiff was entitled to commissions on the contract of September 9, 1914, during the whole period of time that Bunte Bros. was given advertising space in 686 cars, a period of sixty months, during which time the evidence shows it actually used and occupied such space at the rate fixed in the contract.

It is contended for the defendant that it was permitted under its contract with plaintiff to deduct from commissions due plaintiff the sum of $50 a week, which had been advanced to plaintiff during the time he was employed by defendant. Plaintiff's employment with defendant terminated about September 1, 1916. There is evidence from which it may be said that the defendant notified plaintiff on August 15, 1916, that his employment with defendant would cease on September 1st. Testimony and documentary evidence introduced on behalf of the defendant tends to prove that the weekly allowance of $50 made to plaintiff was to be charged against his account for commissions due him. The plaintiff made no attempt on his direct examination to assert that the $50 a week was to be allowed him in addition to his commissions. He first made this assertion when testifying in rebuttal of testimony introduced by defendant. Mr. Bour, president of defendant, at the time of plaintiff's employment, testified that plaintiff was to be allowed a drawing account of $50 a week against his commissions; that "that is the general arrangement made with a solicitor, and has been during my career in the advertising business." It is argued that the commissions to be paid plaintiff were to be compensation not only for securing contracts with advertisers, but that he had additional duties to perform in connection with his employment; that in addition thereto he was to prepare a copy, to see that the accounts were collected on contracts which he secured, and that he

plaintiff's right to commissions. Without attempting to refer here to all the evidence touching this question, we are of opinion that the trial court did not err in holding that the plaintiff was entitled to commissions on the contract of September 9, 1914, during the whole period of time that Burke Bros. was given advertising space in 880 cars, a period of sixty months, during which time the evidence shows it actually used and occupied such space at the rate fixed in the contract.

It is contended for the defendant that it was permitted under its contract with plaintiff to deduct from commissions due plaintiff the sum of $30 a week, which had been advanced to plaintiff during the time he was employed by defendant. Plaintiff's employment with defendant terminated about September 1, 1916. There is evidence from which it may be said that the defendant notified plaintiff on August 15, 1916, that his employment with defendant would cease on September 1st. Testimony and documentary evidence introduced on behalf of the defendant tends to prove that the weekly allowance of $30 made to plaintiff was to be charged against his account for commissions due him. The plaintiff made no attempt on his direct examination to assert that the $30 a week was to be allowed him in addition to his commissions. He first made this assertion when testifying in rebuttal of testimony introduced by defendant. Mr. Hour, president of defendant, at the time of plaintiff's employment, testified that plaintiff was to be allowed a drawing account of $30 a week against his commissions; that "that is the general arrangement made with a solicitor, and has been during my career in the advertising business." It is argued that the commissions to be paid plaintiff were to be compensation not only for securing contracts with advertisers, but that he had additional duties to perform in connection with his employment; that in addition thereto he was to prepare a copy, to see that the accounts were collected on contracts which he secured, and that he

was to aid advertisers in other ways. On this question we think there was sufficient evidence introduced to warrant a finding that such services were not required of plaintiff under his contract. This argument is made in support of the contention that plaintiff was not entitled to commissions on the Bunte Bros. contract on sums paid thereon by defendant after plaintiff had left the employ of defendant. Under the first arrangement with the defendant plaintiff was to receive a commission of 10 per cent and a drawing account of $50 a week, which defendant's evidence shows was to be charged against commissions. Plaintiff had overdrawn his account with defendant during the first months of his employment, and in September, 1912, his commission was raised to 15 per cent, as testified to by Mr. Bour, so that plaintiff might reduce his drafts. The evidence shows that on several occasions during the course of his employment plaintiff was given statements of his account showing these overdrafts and there is no evidence in the record that during all this time he made any claim at all that the $50 a week which had been paid him should not have been charged to his commissions account. Without attempting to indicate all the evidence in the record on this latter question, it is our opinion that the preponderance of the evidence thereon manifestly supports the contention of defendant. In a letter dated July 31, 1916, about thirty days before plaintiff left the employ of defendant, plaintiff wrote that in a statement furnished him by defendant an overdraft appeared that was not justifiable; that defendant had failed to give him credit on certain accounts that plaintiff had worked on for some time. In this letter plaintiff calls attention specifically to the accounts referred to. No mention is made of his present claim that the $50 a week allowance during a long period of time was improperly charged against commissions due him.

was to aid advertisers in other ways. On this question we think there was sufficient evidence introduced to warrant a finding that such services were not rendered of plaintiff under his contract. This argument is made in support of the contention that plaintiff was not entitled to commissions on the Bunte Bros. contract on sums paid thereon by defendant after plaintiff had left the employ of defendant. Under the first arrangement with the defendant plaintiff was to receive a commission of 10 per cent and a drawing account of $50 a week, which defendant's evidence shows was to be charged against commissions. Plaintiff had overdrawn his account with defendant during the first months of his employment, and in September, 1912, his commission was raised to 15 per cent, as testified to by Mr. Kerr, so that plaintiff might reduce his debts. The evidence shows that on several occasions during the course of his employment plaintiff was given statements of his account showing these overdrafts and there is no evidence in the record that during all this time he made any claim at all that the $50 a week which had been paid him should not have been charged to his commissions account. Without attempting to indicate all the evidence in the record on this latter question, it is our opinion that the preponderance of the evidence thereon unmistakably supports the contention of defendant. In a letter dated July 31, 1913, about thirty days before plaintiff left the employ of defendant, plaintiff wrote that in a statement furnished him by defendant an overdraft appeared that was not justifiable; that defendant had failed to give him credit on certain accounts that plaintiff had worked on for some time. In this letter plaintiff makes reference specifically to the accounts referred to. No mention is made of his present claim that the $50 a week allowance during a long period of time was improperly charged against commissions due him.

We think the court erred in holding that the $50 weekly payments were not chargeable against commissions due plaintiff. The Statute of Frauds is not applicable to the facts of the case. The contract of Bunte Bros. and the defendant was in writing. Plaintiff was employed by defendant under an oral agreement which provided for the performance of services by plaintiff for an indefinite period. The evidence shows that plaintiff was not employed by defendant for a definite period of more than one year, and his substantive right to commissions due him, while measured by collections made by defendant under its written contract with Bunte Bros., was founded on his oral agreement with defendant.

The judgment of the trial court in favor of the plaintiff was for the sum of $5372.80. We think the evidence shows that plaintiff had overdrawn his account with the defendant aside from the amount due plaintiff under the Bunte Bros. contract in the sum of $2454.77; deducting this latter sum from the amount of the judgment leaves the sum of $2918.03 legally due plaintiff.

The judgment of the trial court is reversed and judgment in favor of plaintiff entered in this court for the sum of $2918.03.

REVERSED AND JUDGMENT HERE IN FAVOR OF PLAINTIFF FOR THE SUM OF $2918.03.

McSurely, P. J., and Matchett, J., concur.

We think the court erred in holding that the $30 weekly payments were not chargeable against commissions due plaintiff. The statute of frauds is not applicable to the facts of the case. The contract of Bunte Bros. and the defendant was in writing. Plaintiff was employed by defendant under an oral agreement which provided for the performance of services by plaintiff for an indefinite period. The evidence shows that plaintiff was not employed by defendant for a definite period of more than one year, and his subsistive right to commissions due him, while measured by collections made by defendant under its written contract with Bunte Bros., was founded on his oral agreement with defendant.

The judgment of the trial court in favor of the plaintiff was for the sum of $5279.30. We think the evidence shows that plaintiff had overdrawn his account with the defendant aside from the amount due plaintiff under the Bunte Bros. contract in the sum of $2424.77; deducting this latter sum from the amount of the judgment leaves the sum of $2854.03 legally due plaintiff.

The judgment of the trial court is reversed and judgment in favor of plaintiff entered in this court for the sum of $2854.03.

REVERSED AND JUDGMENT ENTERED.

McBride, C. J., and Mitchell, J., concur.

2683a

222 - 27179

LOUIS A. KLEIN,
Appellee,

vs.

E. B. SODE, Doing Business as E. B. SODE PAPER BOX CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 600

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago in an action to recover commissions which, in a statement of claim, he alleges were due him from defendant on an oral contract, under the terms of which plaintiff was employed by defendant upon a commission basis of 5 per cent. to solicit orders for material produced by defendant.

Judgment was entered in favor of the plaintiff on a verdict of a jury for the sum of $600, which the defendant seeks to reverse by his appeal to this court. It is said that the verdict of the jury was against the weight of the evidence. It seems to have been conceded on the trial that defendant had employed plaintiff under the contract from June, 1919, to January 6, 1920, upon which later date plaintiff was discharged by defendant; that at this time plaintiff received $2.40, a balance due him for commissions upon orders obtained by him and which had been paid for by purchasers. The dispute between the parties is as to whether defendant is liable to pay plaintiff commissions on orders taken before the termination of the contract and which had not been fully executed by delivery before that date. On this question there is a direct contradiction in the evidence.

Plaintiff testified that at the time he severed his connections with defendant there was due him a commission of 5 per cent. upon orders amounting in the aggregate to $23,269.38.

222 - 2717

LOUIS A. KLEIN, Appellee,	
vs.	
R. E. SOHN, doing business as E. E. SOHN PAPER BOX CO., Appellant.	

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

327 I.A. 600

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago in an action to recover commissions which, in a statement of claim, he alleges were due him from defendant on an oral contract, under the terms of which plaintiff was employed by defendant upon a commission basis of 5 per cent. to solicit orders for material pro vided by defendant.

Judgment was entered in favor of the plaintiff on a verdict of a jury for the sum of $600, which the defendant seeks to reverse by his appeal to this court. It is said that the verdict of the jury was against the weight of the evidence. It seems to have been conceded on the trial that defendant had employed plaintiff under the contract from June, 1919, to January 6, 1920, upon which later date plaintiff was discharged by defendant; that at this time plaintiff received $2.40, a balance due him for commissions upon orders obtained by him and which had been paid for by purchasers. The dispute between the parties is as to whether defendant is liable to pay plaintiff commissions on orders taken before the termination of the contract and which had not been fully executed by delivery before that date. On this question there is a direct contradiction in the evidence.

Plaintiff testified that at the time he entered his connections with defendant there was due him a commission of 5 per cent. upon orders amounting in the aggregate to $22,869.38.

From our examination of the evidence as it appears in the record we are unable to hold that the verdict of the jury is against the weight of the evidence. The jury saw fit to award plaintiff the sum of $600, and if his testimony be true, he is clearly entitled to receive this sum from defendant.

There is no merit in the point made that the court erred in giving an oral instruction to the jury touching the question of the preponderance of the evidence. Defendant did not object at the trial to the giving of this instruction. Freet v. American Electrical Supply Co., 171 Ill. App. 512.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

From our examination of the evidence, it appears in the record we are unable to hold that the verdict of the jury in against the weight of the evidence. The jury saw fit to award plaintiff the sum of $600, and if his testimony be true, he is clearly entitled to recover this sum from defendant.

There is no merit in the point made that the court erred in giving an oral instruction to the jury touching the question of the preponderance of the evidence. Defendant did not object at the trial to the giving of this instruction. Tyson v. American Electrical Supply Co., 171 Ill. App. 512.

The judgment of the municipal court is affirmed.

AFFIRMED.

McGarvey, P. J., and Kickerbocker, J., concur.

26840

245 - 27203

ABE PERLMAN and IDA COHEN,
Appellees,

vs.

ANNA STEVENSON,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 600

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in the Municipal court of Chicago in an action of forcible entry and detainer to obtain possession of a second floor flat in the building known as No. 3622 Lexington avenue, Chicago. A judgment was entered in favor of the plaintiffs for possession of the premises, which the defendant seeks to reverse by appeal to this court.

It is agreed that defendant was occupying the premises as a tenant from month to month. For defendant it is urged that plaintiffs had served her with a thirty days notice of their election to terminate the tenancy and that this notice expired April 30, 1921; that a statute in relation to landlord and tenant in force July 1, 1873, had been amended by an act approved April 29, 1921; that under the amendment plaintiffs were required to give a sixty days notice in writing of their election to terminate the tenancy.

It is asserted that the notice served upon the defendant was a thirty days notice; that it expired April 30, 1921, one day after the amendment was in force, and that hence the thirty days notice was, under the amendment, ineffective to terminate the tenancy. This contention is not well grounded. If for no other reason, the judgment must be affirmed because the notice in question does not appear in the abstract of record filed in the cause. One of the plaintiffs testified that she served a notice

243 - 27203

ALICE FRANKLIN and IDA COHEN, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
ADDA STEVENSON, Appellant.	

MR. JUSTICE SEVEN DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit in the Municipal court of Chicago in an action of forcible entry and detainer to obtain possession of a second floor flat in the building known as No. 3622 Lexington avenue, Chicago. A judgment was entered in favor of the plaintiffs for possession of the premises, which the defendant seeks to reverse by appeal to this court.

It is agreed that defendant was occupying the premises as a tenant from month to month. For defendant it is urged that plaintiffs had served her with a thirty days notice of their election to terminate the tenancy and that this notice expired April 30, 1921; that a statute in relation to landlord and tenant in force July 1, 1879, had been amended by an act approved April 20, 1921; that under the amendment plaintiffs were required to give a sixty days notice in writing of their election to terminate the tenancy.

It is asserted that the notice served upon the defendant was a thirty days notice; that it expired April 30, 1921, one day after the amendment was in force, and that hence the thirty days notice was, under the amendment, ineffective to terminate the tenancy. This contention is not well grounded. If for no other reason, the judgment must be affirmed because the notice in question does not appear in the abstract of record filed in the cause. One of the plaintiffs testifies that she served a notice

on defendant on March 29th; this notice does not appear otherwise in the abstract, but even if it were shown therein, it is our opinion that if a thirty days notice had been duly served on March 29th, the notice would have been sufficient under the law.

It is true, as said, that there can be no vested right in a particular remedy, or any special mode of administering a remedy. Woods v. Soucy, 166 Ill. 407. At the time plaintiffs served the notice in question it was sufficient under the law to terminate the tenancy. The service of the notice, which was legally sufficient at the time it was served upon defendant, put an end to the tenancy as of April 30, 1921. The passage of the law on April 29, 1921, could not deprive plaintiffs of their property rights in the premises for another sixty days. No such intention appears in the language of the amendment to the statute and nothing therein indicates a purpose on the part of the legislature to give the amendment a retrospective effect.

The judgment of the Municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

on defendant on March 29th; this notice does not appear otherwise in the abstract, but even if it were shown therein, it is our opinion that if a thirty days notice had been duly served on March 29th, the notice would have been sufficient under the law.

It is true, as said, that there can be no vested right in a particular remedy, or any special mode of administering a remedy. Woods v. Sawyer, 156 Ill. 497. At the time plaintiffs served the notice in question it was sufficient under the law to terminate the tenancy. The service of the notice, which was legally sufficient at the time it was served upon defendant, put an end to the tenancy as of April 30, 1921. The passage of the law on April 29, 1921, could not deprive plaintiffs of their property rights in the premises for another thirty days. No such intention appears in the language of the amendment to the statute and nothing therein indicates a purpose on the part of the legislature to give the amendment a retrospective effect.

The judgment of the municipal court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

257 - 27215

CONTINENTAL AND COMMERCIAL NATIONAL BANK OF CHICAGO, a Corporation,
Appellant,

vs.

REINER COAL COMPANY, a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 600[3]

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court of Cook County entered therein upon a directed verdict in favor of the defendant, Reiner Coal Company.

The material facts of the case are as follows: October 25, 1918, defendant executed a promissory note payable to Taylor Coal Company for $3,500 due six months after date. Thereafter Taylor Coal Company discounted the note at plaintiff's bank and received credit for the amount paid in its account with plaintiff. April 23, 1919, Taylor Coal Company executed and delivered to Reiner Coal Company a general release, excepting therefrom three notes not involved in the present case. April 25, 1919, the note in suit became due and was marked "paid" on the books of the plaintiff bank. Plaintiff asserts that on the same day a red line was drawn through this credit item and it was agreed on the trial that the practice prevailed in the bank of entering a payment item on the morning when a discounted note became due, and then in the evening of the same day, if it was found that as a matter of fact the note was not paid, to erase the credit item by an interlineation. Testimony introduced for the defendant was to the effect that the red line did not appear on the book on May 2, 1919. April 26, 1919, the day after the note became due, Taylor Coal Company drew its check payable to the order of plaintiff and drawn on plaintiff bank for the sum

527 - 27216

CONTINENTAL AND COMMERCIAL NATIONAL BANK OF CHICAGO, a Corporation, Appellant,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
HAINER COAL COMPANY, a Corporation, Appellee.	227 I.A. 609

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit court of Cook County entered therein upon a directed verdict in favor of the defendant, Hainer Coal Company.

The material facts of the case are as follows: October 25, 1919, defendant executed a promissory note payable to Taylor Coal Company for $3,500 due six months after date. Thereafter Taylor Coal Company discounted the note at plaintiff's bank and received credit for the amount paid in its account with plaintiff. April 23, 1919, Taylor Coal Company executed and delivered to Hainer Coal Company a general release, excepting therefrom three notes not involved in the present case. April 28, 1919, the note in suit became due and was marked "paid" on the books of the plaintiff bank. Plaintiff accorded that on the same day a red item was drawn for $3,500 this credit item and it was agreed on the trial that the practice prevailing in the bank of entering a payment item on the morning when a discounted note became due, and then in the evening of the same day, if it was found that as a matter of fact the note was not paid, to cancel the credit item by an interlineation. Testimony introduced for the defendant was to the effect that the red item did not appear on the book on May 2, 1919. April 28, 1919, the day after the note became due, Taylor Coal Company drew its check payable to the order of plaintiff and drawn on plaintiff bank for the sum

of $3,605, being the amount of the principal and interst due on the note. The check was certified by plaintiff and was delivered by Taylor Coal Company to plaintiff to be held by the latter, as it insists, as security or indemnity in the event plaintiff failed to recover a judgment against defendant in the present action. Evidence introduced on behalf of defendant tends to show that on April 26, 1919, a notice of protest of the note was sent to defendant and that on the next day its president called at the bank and informed plaintiff's note teller that arrangements had been made by defendant for payment of the note by Taylor Coal Company; that Doering, plaintiff's note teller, informed defendant's president that the note had been taken care of; that he, defendant's president, had exhibited the release above referred to to one Gilkes, assistant cashier of the bank; that May 2, 1919, defendant's president and its attorney went to the bank and talked with Mr. Doering, defendant's note teller, and that the latter said that the note in question had been paid.

It is contended that the court erred in excluding evidence offered by the plaintiff. Mr. Gilkes, plaintiff's assistant cashier, was called as a witness on behalf of defendant. He testified that the check of the Taylor Coal Company was received by the bank and that the word "accepted" which appeared on its face meant that the amount of the check was deducted from the Taylor Coal Company's account therein and placed in a certified check account "to meet this check when it comes in." The check was introduced in evidence. On cross-examination this witness testified as follows:

> "I received that check from the Taylor Coal Company on April 26, 1919. At the time we received it there was a conversation as to the purpose for which it was to be used. The conversation was between Mr. Sheppard, secretary of the Taylor Coal Company, Mr. Waldeck, vice president of

3

of $5,000, being the amount of the principal and interest due on the note. The check was certified by plaintiff and was delivered by Taylor Coal Company to plaintiff to be held by the latter, as it insists, as security or indemnity in the event plaintiff failed to recover a judgment against defendant in the present action. Evidence introduced on behalf of defendant tends to show that on April 26, 1929, a notice of protest of the note was sent to defendant and that on the same day the president, cashier of the bank and informer plaintiff's note holder that arrangements had been made by defendant for payment of the note by Taylor Coal Company; that Doering, plaintiff's note holder, informed defendant's president that the note had been taken care of; that he, defendant's president, had exhibited to [illegible] release given to him by one Gilley, [illegible] May 2, 1929, defendant's president was at the [illegible] bank and talked with [illegible] Doering, defendant's note holder, and that the latter said [illegible] the note in [illegible] had been [illegible].

It is conceded that the [illegible] evidence offered by the plaintiff, Mr. [illegible], plaintiff's assistant cashier, was [illegible] "[illegible]" of defendant. He testified that the [illegible] Coal Company [illegible] endorsed by the bank [illegible] "[illegible]" [illegible] his face meant "[illegible] of the check was [illegible] the Taylor Coal Company's account [illegible] titled check account "[illegible]". [illegible] The check was [illegible] [illegible] this witness testified as follows:

> "I received that check from [illegible] April 26, 1929. At the time we received it there was a conversation as to the payment [illegible] week. The conversation was between [illegible], president of the Taylor Coal Company, Mr. [illegible], [illegible]

> the bank, and myself. I was also connected with the bank at that time. The substance of it was that it was to be held as indemnity pending the outcome of this suit."

On motion of defendant's counsel this evidence was stricken out and the court refused to permit any evidence of conversations had between representatives of the Taylor Coal Company and the bank occurring at the time the check was delivered to plaintiff. The point was not made, as we read the abstract of record, that this evidence was not proper to elicit on cross-examination. It was insisted that the evidence was immaterial. Later in cross-examination the witness stated:

> "The substance of the conversation was that we were to collect the amount of this note out of the Reiner Coal Company, and the check was given to us as an indemnity, and the check has been held as such ever since."

This evidence also was stricken out on motion. While the witness was on the stand counsel for plaintiff offered to prove by the witness that "at a conversation had before the check in question here was given, after the note became due, it was agreed between the Taylor Coal Company and the Continental and Commercial National Bank, the plaintiff, that the Taylor Coal Company should give to the bank a certified check as and for indemnity, and that the bank was then to proceed against the Reiner Coal Company; that the purpose of the check was that if the bank did not succeed against the Reiner Coal Company they might have this indemnity for the liability of the Taylor Coal Company on paper by reason of its endorsement." Objection was made and sustained to this offer of proof also. Later in the hearing, as shown by several pages of the abstract of record, the trial Judge and counsel for both parties, for the purpose of facilitating the trial, entered into a somewhat extended discussion as to what evidence should or should not be admitted on the trial. During the course of this colloquy it was agreed

the bank, and myself. I was also connected with the bank at that time. The substance of it was that it was to be held as indemnity pending the outcome of this suit."

On motion of defendant's counsel this evidence was stricken out and the court refused to permit any evidence of conversations had between representatives of the Taylor Coal Company and the bank concerning at the time the check was delivered to plaintiff. The point was not made, as we read the abstract of record, that this evidence was not proper to elicit on cross-examination. It was insisted that the evidence was immaterial. Later in cross-examination the witness stated:

"The substance of the conversation was that we were to collect the amount of this note out of the Heiner Coal Company, and the check was given to us as an indemnity, and the check has been held as such ever since."

This evidence also was stricken out on motion.

While the witness was on the stand counsel for plaintiff offered to prove by the witness that "at a conversation had before the check in question here was given, after the note became due, it was agreed between the Taylor Coal Company and the Continental and Commercial National Bank, the plaintiff, that the Taylor Coal Company should give to the bank a certified check as and for indemnity, and that the bank was then to proceed against the Heiner Coal Company; that the purpose of the check was that if the bank did not succeed against the Heiner Coal Company they might have this indemnity for the liability of the Taylor Coal Company on paper by reason of its endorsement." Objection was made and sustained to this offer of proof also. Later in the hearing, as shown by several pages of the abstract of record, the trial judge and counsel for both parties, for the purpose of facilitating the trial, entered into a somewhat extended discussion as to what evidence should or should not be admitted on the trial. During the course of this colloquy it was agreed

by both sides "that immediately after the making of the note in question and at the time when the same became due, the plaintiff in this case became and was a holder in due course, before maturity and for a reasonable value, of the note in question, without any knowledge of defense on the part of the maker."

It was further admitted on the trial by defendant's counsel that plaintiff had no knowledge whatsoever of the release which was given to defendant by Taylor Coal Company until after the maturity of the note, when it was first brought to its attention.

The court permitted the defendant to show that the certified check was delivered to plaintiff April 26, 1919. The note became due April 25, 1919. Evidence introduced on behalf of plaintiff tends to show that the red line was drawn upon the word "paid" on the evening of the day that the note became due.

It is said that the court erred in admitting the release executed by Taylor Coal Company to defendant. It is charged in defendant's plea that Taylor Coal Company had actually paid the note in question and that the suit brought against defendant was the result of collusion between that company and plaintiff. It is conceded that at the time the note became due plaintiff had no knowledge whatsoever of the execution and delivery of the release to defendant. In the absence of evidence tending to establish the collusion, as alleged, the release would not be admissible in evidence. The defendant was primarily liable on the note as maker. The plaintiff's interest as a bona fide holder of the note for value before maturity could not be effected by the release executed by the endorser of the note. The release was admissible in evidence only on the theory that the note in question had been paid by Taylor Coal Company and

by both alone "that immediately after the making of the note in question and at the time when the same became due, the plaintiff in this case became and was a holder in due course, before maturity and for a reasonable value, of the note in question, without any knowledge of defense on the part of the maker."

It was further admitted on the trial by defendant's counsel that plaintiff had no knowledge whatsoever of the release which was given to defendant by Taylor Coal Company until after the maturity of the note, when it was first brought to its attention.

The court permitted the defendant to show that the certified check was delivered to plaintiff April 25, 1919. The note became due April 25, 1919. Evidence introduced on behalf of plaintiff tends to show that the red line was drawn upon the word "paid" on the evening of the day that the note became due.

It is said that the court erred in admitting the release executed by Taylor Coal Company to defendant. It is charged in defendant's plea that Taylor Coal Company had actually paid the note in question and that the suit brought against defendant was the result of collusion between that company and plaintiff. It is conceded that at the time the note became due plaintiff had no knowledge whatsoever of the execution and delivery of the release to defendant. In the absence of evidence tending to establish the collusion, as alleged, the release would not be admissible in evidence. The defendant was primarily liable on the note as maker. The plaintiff's interest as a bona fide holder of the note for value before maturity could not be affected by the release executed by the endorser of the note. The release was admissible in evidence only on the theory that the note in question had been paid by Taylor Coal Company and

that the release constituted a part of the transaction or transactions which evidenced the collusion charged in the plea. The only evidence introduced on the trial in support of the plea was certain admissions said to have been made by representatives of plaintiff after the note became due and demand for payment had been made upon defendant. This evidence was not sufficient to authorize the admission of the release. Dod v. Edwards, 2 C & P. 602, 12 Eng. C. L. 757; 5 Am. & Eng. Ency. of Pl. & Pr, 943; 5 Corp. J. 960; Creighton v. Village of Hyde Park, 6 Ill. App. 272.

It may be conceded, as urged for defendant, that there are authorities in this State which hold that a mere offer of evidence to prove a conclusionis objectionable. Martin v. Hertz, 224 Ill. 84. We are not prepared to say, however, on the authorities called to our attention, that a witness must in every case be placed upon the stand and interrogated before error can be predicated on a refusal to admit offered evidence. The record before us shows that plaintiff's counsel offered to prove by three witnesses that the Taylor Coal Company's certified check was delivered to plaintiff as indemnity or security to cover Taylor Coal Company's liability as endorser of the note. A careful examination of the somewhat extended discussion between counsel and the court as to what proof was admissible and material upon the issues in the case discloses that counsel for both parties and the court in definite terms expressed their clear understanding of what evidence the trial Judge believed was admissible in support of plaintiff's case. Counsel for defendant showed a commendable desire to facilitate the trial by admitting material facts; and it is perfectly clear from what was said by both the trial Judge and counsel that the court refused to permit the plaintiff to prove its version of what appears to have been the

that the release constituted a part of the transaction or transactions which evidenced the collision charged in the plea. The only evidence introduced on the trial in support of the plea was certain admissions said to have been made by representatives of plaintiff after the note became due and demand for payment had been made upon defendant. This evidence was not sufficient to authorize the admission of the release. Doe v. Newkirk, 2 C & P. 602, 12 Eng. C. L. 727; 3 Am. & Eng. Ency. of Ev. 2 Ed. 948; 5 Cyc. 1. 330; Creighton v. Village of Hyde Park, 3 Ill. App. 272.

It may be conceded, as urged for defendant, that there are authorities in this State which hold that a mere offer of evidence to prove a conclusions constitutionals. Martin v. Harris, 224 Ill. 94. We are not prepared to say, however, in the authorities called to our attention, that a witness must in every case be placed upon the stand and interrogated before counsel can be predicated on a refusal to admit offered evidence. The record before us shows that plaintiff's counsel offered to prove by three witnesses that the Taylor Coal Company's certified check was delivered to plaintiff as indemnity or security to cover Taylor Coal Company's liability as waiver of the note. A careful examination of the evidence adduced discussion counsel and the court as to what proof was admissible and material upon the issues in the case discloses that counsel for both parties and the court in definite terms expressed their clear understanding of what evidence the trial judge believed was admissible in support of plaintiff's case. Counsel for defendant manifested a commendable desire to facilitate the trial by admitting material facts; and it is perfectly clear from what was said by both the trial Judge and counsel that the court refused to permit the plaintiff to prove its version of what appears to have been the

only material question of fact in dispute. It is true that evidence was admitted which tended to show that Doering, plaintiff's note teller, had made a statement that the check was given in payment of the note. We do not think, however, that this evidence was conclusive on the rights of plaintiff even though it remains undisputed in the evidence. We are convinced that the trial Judge was of the opinion that the plaintiff was conclusively bound by the single fact that it had received the certified check from the Taylor Coal Company and had given the latter credit therefor in its discount ledger; and on this point we think the court was in error. It was competent for the plaintiff to show that the check was given by way of indemnity and not in payment of the note. Proper evidence tendered for this purpose was excluded.

Section 57 of Uniform Negotiable Instrument Act (Hurd's R. S. 1919, p. 2029) provides that "a holder in due course holds the instrument * * * free from defenses available to prior parties among themselves." Defendant was primarily liable on the note as maker, and plaintiff was not precluded by law from accepting security from the endorser to be applied in payment of the note only in the event that the holder had failed to recover the amount due thereon from the maker. Peoples National Bank of Hackensack v. Rice, 133 N. Y. Supp. 622. Indeed, as we read the brief filed on behalf of defendant, it is not urged that plaintiff could not by competent proof show the purpose for which the check was given. The objection urged here is that the proof upon which plaintiff relied was not properly tendered or submitted in the trial court.

The judgment of the Circuit court is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

only material question of fact is disputed. It is true that evidence was adduced that tended to show that Worley, plaintiff's note taker, had made a statement that the clerk was given in payment of the note. To do that, however, the trial evidence was conclusive of the rights of "innocent" even though it remains undisputed in the evidence. In the circumstances the trial judge was of the opinion that a jury of twelve was unnecessarily bound by the single fact that it had provided the court had stood upon the Taylor Coal decision and had given the latter credit therefor in its discount judgment and on that point the court was in error. In the circumstances the plaintiff's claim that the check was given by way of in [illegible] payment in exchange for the note. Proper evidence supported the trial judge's conclusion.

Section 55 of [illegible] Act [illegible]

(Ind'a [illegible] 1. [illegible] 1. [illegible]) provides that "a [illegible] in [illegible] holds the [illegible] free from [illegible] to prior parties among themselves." Defendants are [illegible] liable on the note as maker, and plaintiff was not precluded [illegible] recovering recently from the defendants to be applied [illegible] of the note only in the event that the defendants [illegible] the amount [illegible] from [illegible]. [illegible] Hackenbeck v. [illegible] 1. [illegible] 382. [illegible] [illegible] fact filed or [illegible] [illegible], it is not [illegible] could not by [illegible] [illegible] was given. [illegible] plaintiff's [illegible] was [illegible] [illegible] in the trial court.

The judgment of the [illegible] is affirmed [illegible] costs to [illegible] for a new trial.

[illegible]

McNutt, P. J., and Bratteen, J., concur.

266 - 27224

SHERIDAN TRUST & SAVINGS BANK,
a Corporation,
Appellee,

vs.

FRANCIS J. CASEY et al.
On Appeal of Francis J. Casey,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Francis J. Casey was made defendant in a bill filed in the Circuit court of Cook County to foreclose a trust deed dated December 10, 1915, executed and delivered to secure a principal note of even date for the sum of $8,500 and ten interest notes for $233.75 due and payable semi-annually.

The grantors in the trust deed therein agreed as follows:

> "1. To pay said indebtedness and the interest thereon as in said notes provided.
> 2. To pay prior to the first day of July in each year all taxes and assessments against said premises.
> 3. To keep all buildings at any time on said premises insured against loss by fire in companies to be approved by the holder of and in an amount equal to said indebtedness and deliver to the holder of said indebtedness such insurance policies so written as to require all loss to be applied in reduction of the indebtedness.
> The grantors also waive all right to possession of and income from said premises pending foreclosure proceedings and until the period of redemption from any sale thereunder expires, and they agree that immediately upon the commencement of the foreclosure suit a receiver shall be appointed to take possession or charge of the premises, to collect the income, and to apply the same, less expenses, in satisfaction of the debt or of the deficiency decree and to pay any overplus thereafter to the person entitled to the deed on the certificate of sale or in reduction of the redemption money if the premises be redeemed."

The bill was filed April 19, 1921, at which time there was due the principal note of $8,500 and two interest notes, due June 10, 1920, and December 10, 1920, respectively. The bill charged that the defendants had defaulted in payment of taxes and

SHERIDAN TRUST & SAVINGS BANK,
a Corporation,
Appellee,

vs.

FRANCIS J. QUEEY et al.
On Appeal of Francis J. Queey,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

22371 A. 600

MR. JUSTICE HEWES DELIVERED THE OPINION OF THE COURT.

Francis J. Queey was made defendant in a bill filed in the Circuit court of Cook County to foreclose a trust deed dated December 10, 1923, executed and delivered to secure a principal note of even date for the sum of $8,500 and ten interest notes for $255.75 due and payable semi-annually.

The grantors in the trust deed therein agreed as follows:

"1. To pay said indebtedness and the interest thereon as in said notes provided.
2. To pay prior to the first day of July in each year all taxes and assessments against said premises.
3. To keep all buildings at any time on said premises insured against loss by fire in companies to be approved by the holder of and in an amount equal to said indebtedness and deliver to the holder of said indebtedness such insurance policies as he may written as to require all loss to be applied in reduction of the indebtedness.

The grantors also waive all right to possession of and income from said premises pending foreclosure proceedings and until the period of redemption from any sale thereunder expires, and they agree that immediately upon the commencement of the foreclosure suit a receiver shall be appointed to take possession or charge of the premises, to collect the income, and to apply the same, less expenses, in satisfaction of the debt or of the deficiency decree and to pay any surplus thereof to the person entitled to the deed on the certificate of sale or in reduction of the redemption money if the premises be redeemed."

The bill was filed April 19, 1931, at which time there was due the principal note of $8,500 and two interest notes, due June 10, 1930, and December 10, 1930, respectively. The bill charged that the defendants had defaulted in payment of taxes and

assessments levied against the premises; that the premises had been repeatedly sold for taxes and that they were meager and scant security for the indebtedness due complainant. The bill prayed for the appointment of a receiver. Defendants filed an answer neither admitting nor denying certain allegations of the bill and denying certain other allegations therein and they alleged in the answer that the premises in question had a fair cash market value of four times the sum alleged to be due complainant. The bill and answer were referred to a master to take proofs and report his conclusions of law and fact, and the chancellor also referred to the master a sworn petition filed by complainant, which prayed for the appointment of a receiver. This petition is in substance the same as the bill except that it contains a further allegation that defendants had failed to pay taxes due on the premises for the year 1920. The master filed a report in which he found the matters in dispute in favor of the complainant. Objections filed to the report were permitted to stand as exceptions thereto. The report of the master stating the account between the parties as of August 9, 1921, finds that there was due complainant as of that date a total sum of $12,618.46. An order was entered appointing a receiver, as prayed in the petition, and a further order was entered denying a petition to discharge the receiver. Defendants bring both orders to this court by appeal for review.

Upon complainant's petition for the appointment of a receiver the master found that "a receiver ought to be appointed upon complainant's petition, in view of the provisions of the trust deed * * * in and by which the grantors therein expressly waive their homestead and all right to the possession of or any income from the premises pending foreclosure, and agree that immediately upon the commencement of a foreclosure

assessments levied against the premises; that the premises had been repeatedly sold for taxes and that they were meager and scant security for the indebtedness due complainant. The bill prayed for the appointment of a receiver. Defendants filed an answer neither admitting nor denying certain allegations of the bill and denying certain other allegations therein and they alleged in the answer that the premises in question had a fair cash market value of four times the sum alleged to be due complainant. The bill and answer were referred to a master to take proofs and report his conclusions of law and fact, and the chancellor also referred to the master a sworn petition filed by complainant, which prayed for the appointment of a receiver. This petition is in substance the same as the bill except that it contains a further allegation that defendants had failed to pay taxes due on the premises for the year 1931. The master filed a report in which he found the matters in dispute in favor of the complainant. Objections filed to the report were permitted to stand as exceptions thereto. The report of the master stating the account between the parties as of August 6, 1931, finds that there was due complainant as of that date a total sum of $12,818.46. An order was entered appointing a receiver, as prayed in the petition, and a further order was entered denying a petition to discharge the receiver. Defendants bring both orders to this court by appeal for review.

Upon complainant's petition for the appointment of a receiver the master found that "a receiver ought to be appointed upon complainant's petition, in view of the provisions of the trust deed - - - in and by which the premises therein expressly waive their homestead and all rights to the possession of or any income from the premises pending foreclosure, and agree that immediately upon the commencement of a foreclosure

suit a receiver shall be appointed; and agree to pay prior to July 1st in each year all taxes and assessments and to keep said premises insured against fire, and in view of the fact that the principal indebtedness and two interest coupons are past due and totally unpaid, and that the property has been repeatedly sold for non-payment of taxes and special assessments, and that complainant has been obliged to spend over $2,300 to pay off tax liens, and has been obliged to pay a fire insurance premium on said premises, all as set forth above, and in view of the fact, - and in the opinion of the master this is the controlling reason - that the general taxes for 1920 and certain current special assessments are now past due and totally unpaid, as set forth above. This is a present direct breach of the covenants of the trust deed, and unless a receiver is appointed the complainant will be obliged to pay these taxes and special assessments to protect its lien, in addition to the large expenditures made by it as above set forth."

It is asserted on the authority of Glennon v. Wilcox, 159 Ill. App., that two conditions are essential before a receiver can legally be appointed in a case such as the one at bar: First, that the debtor is insolvent; and, second, that the property is meager and scant security for the debt. The evidence in the case shows that the defendants have failed to pay taxes and special assessments for any year following the date of the execution of the trust deed and notes. The trust deed specifically provided that the owner of the property would surrender possession thereof and would permit the appointment of a receiver therefor upon failure on their part to comply with the terms thereof. Ordinarily where the value of the property is largely in excess of the mortgage lien a receiver will not be appointed to take possession of the rents and

suit a receiver shall be appointed; and agree to pay prior to July 1st in each year all taxes and assessments and to keep said premises insured against fire, and in view of the fact that the principal indebtedness and two interest coupons are past due and totally unpaid, and that the property has been repeatedly sold for non-payment of taxes and special assessments, and that complainant has been obliged to spend over $2,300 to pay off tax liens, and has been obliged to pay a fire insurance premium on said premises, all as set forth above, and in view of the fact, - and in the opinion of the master this is the controlling reason - that the general taxes for 1930 and certain current special assessments are now past due and totally unpaid, as set forth above. This is a present direct breach of the covenants of the trust deed, and unless a receiver is appointed the complainant will be obliged to pay these taxes and special assessments to protect its lien, in addition to the large expenditures made by it as above set forth."

It is asserted on the authority of Gibson v. Wilson, 159 Ill. App., that two conditions are essential before a receiver can legally be appointed in a case such as the one at bar: First, that the debtor is in default; and, second, that the property is insufficient security for the debt. The evidence in the case shows that the defendants have failed to pay taxes and special assessments for any year following the date of the execution of the trust deed and notes. The trust deed specifically provides that the owner of the property would surrender possession thereof and of all rents to the appointment of a receiver therefor upon failure on their part to comply with the terms thereof. Ordinarily where the value of the property is largely in excess of the mortgage lien a receiver will not be appointed to take possession of the rents and

profits issuing therefrom pending foreclosure proceedings. It appears here that the principal note and two interest notes were due and unpaid and that the property at different times following the execution of the trust deed had been sold to pay taxes and special assessments due for the years subsequent to the year 1915.

The property in question consists of a lot of land with a residence thereon occupied by defendants as their homestead. No income is derived from any part of the premises. The master found and the evidence sufficiently shows that the property was worth at least double the amount found due the complainant. Complainant had purchased prior to the filing of the bill a number of tax certificates, some at least of which constituted apparent liens against the premises. All of these and other expenditures were properly included in a final decree in favor of the complainant. The master gave as a controlling reason for his recommendation that defendants had failed to pay the general taxes due on the property for the year 1920, and certain current special assessments, and he concluded that the failure to pay these assessments and taxes was a present direct breach of the covenants of the trust deed.

In the case of Bagley v. Illinois Trust & Savings Bank, 199 Ill. 76, the Supreme Court said:

> "It is not meant, however, to be said a court of equity will appoint a receiver simply because such appointment is stipulated for in the mortgage. The court is not bound to enforce such a provision where it is not necessary to enforce the lien on the rents and profits for the payment of the mortgage debt. But it has been held that such an agreement in the mortgage is entitled to weight in determining whether the power of the court to make the appointment should be exercised or not."

In the case of Stephenson v. Porter, 191 Ill. App. 303, it was held that an order appointing a receiver would be reversed where it appeared from the evidence that the property

profits issuing therefrom pending foreclosure proceedings. It appears here that the principal note and two interest notes were due and unpaid and that the property at different times following the execution of the trust deed had been sold to pay taxes and special assessments due for the years subsequent to the year 1932.

The property in question consists of a lot of land with a residence thereon occupied by defendants as their homestead. No income is derived from any part of the premises. The master found and the evidence sufficiently shows that the property was worth at least double the amount found due the complainant. Complainant had purchased prior to the filing of the bill a number of tax certificates, some at least of which constituted apparent liens against the premises. All of these and other expenditures were properly included in a final decree in favor of the complainant. The master gave as a controlling reason for his recommendation that defendants had failed to pay the general taxes due on the property for the year 1932, and certain current special assessments, and he concluded that the failure to pay those assessments was a apparent direct breach of the covenants of the trust deed.

In the case of Bowler v. Illinois Trust & Savings Bank, 329 Ill. 76, the Supreme Court said:

> "It is not meet, however, to be said a court of equity will appoint a receiver simply because such a proceeding is stipulated for in the mortgage. The court is not bound to enforce such a provision where it is not necessary to enforce the lien on the rents and profits for the payment of the mortgage debt. But it has ever held that the stipulation in the mortgage is entitled to weight in determining whether the power of the court to make the appointment should be exercised or not."

In the case of Stonebraker v. Bartley, 341 Ill. 499, 503, it was held that an order appointing a receiver would be reversed where it appeared from the evidence that the property

was worth more than the amount of the indebtedness. In the present case the property is worth at least double the amount found to be due complainant, and in view of this fact we are unable to discover what purposes would be served by the appointment of a receiver therefor. No income was derived by defendants from the premises, and at least at the time of his appointment and up to the time when an order was entered in the cause requiring defendant Francis J. Casey to pay rent for the premises, the receiver would of course be unable to collect an income therefrom. Except as to the general taxes for the year 1920 and current special assessments, the complainant had of its own motion protected the lien of the trust deed by purchasing certain outstanding tax certificates against the premises. At the time the receiver was appointed no deficiency decree had been entered in the cause. It is our opinion, therefore, that the court erred in appointing a receiver for the premises. Such appointment could not, in view of the evidence, serve to protect the interests of any of the parties to the litigation. The complainant, by reason of the large value of the property, appears to have been well protected from loss.

It is our further opinion that the court erred in refusing to discharge the receiver on petition of Francis J. Casey, defendant, not specially because, as urged by defendant, that he had tendered payment of the 1920 taxes due, nor because he had a substantial money offer for the purchase of a part of the premises. It was error in the first instance to appoint the receiver and, as a consequence, we think the court erred in refusing to discharge the receiver when application was made therefor. It follows from what has been said that a subsequent order requiring defendant Francis J. Casey to pay rent is void.

was worth more than the amount of the indebtedness. In the present case the property is worth at least double the amount found to be due complainant, and in view of this fact we are unable to discover what purpose would be served by the appointment of a receiver therefor. No income was derived by defendants from the premises, and at least at the time of his appointment and up to the time when an order was entered in the cause requiring defendant Frando A. Ukeny to pay rent for the premises, the receiver would of course be unable to collect an income therefrom. Except as to the general taxes for the year 1920 and current special assessments, the complainant had of its own motion protected the lien of the trust deed by purchasing certain outstanding tax certificates against the premises. At the time the receiver was appointed no deficiency decree had been entered in the cause. It is our opinion, therefore, that the court erred in appointing a receiver for the premises. Such appointment could not, in view of the evidence, serve to protect the interests of any of the parties to the litigation. The equity court, by reason of the [illegible] of the property, appears to have been well protected from loss.

It is our further opinion that the court erred in refusing to discharge the receiver on petition of Frando A. Ukeny, defendant, not personally bound, as found by the decree, that he had tendered payment of the 1920 taxes due, nor in ordering he had a sufficient money order for the purchase of a part of the premises. It was error in the first instance to appoint the receiver and, as a consequence, we think the court erred in refusing to discharge the receiver when such action was made therefor. It follows from what has been said that a cause- quent order requiring defendant Frando A. Ukeny to pay rent is void.

The order of the Circuit court appointing the receiver, and the order denying the defendant's petition to remove the receiver are reversed.

REVERSED.

McSurely, P. J., and Matchett, J., concur.

The order of the Circuit court appointing the receiver, and the order denying the defendant's petition to remove the receiver are reversed.

REVERSED.

McBurnly, J. C., and Lathrett, J., concur.

See brief to 27224 above

2687a

266 - 27504

SHERIDAN TRUST & SAVINGS BANK,
a Corporation,
Appellee,

vs.

FRANCIS J. CASEY et al.
On Appeal of Francis J. Casey,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

227 I.A. 601

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by Francis J. Casey, defendant, from a decree entered in the Circuit court of Cook County in favor of the complainant, Sheridan Trust & Savings Bank, a corporation, in proceedings to foreclose a trust deed conveying certain premises owned by appellant and his wife.

Material facts in the case are stated in an opinion in case No. 27224, filed herewith, and the facts and conclusions of the court as therein stated may be taken as incorporated in this opinion.

It is said by defendant that certain tax certificates purchased by complainant did not constitute valid liens against the premises. These certificates were issued in the first instance to one E. A. Deans. The holder of the trust deed and notes had the right under the trust deed to purchase any tax certificates or tax titles which did or might affect title to the premises, and such holder had the further right to pay any tax of record which might create an apparent lien against them. Where real estate has been sold for taxes and a deed issued, the purchaser thereof may acquire a title superior to that of the holder of the trust deed and notes. Woitynek v. Franken, 300 Ill. 418.

It is urged in the brief filed for appellant that complainant had purchased a lot of old, void and worthless certificates that could not be considered valid liens against the

366 - 376U.

[illegible] TRUST & SAVINGS BANK,
a Corporation,
Appellee,

vs.

[illegible] T. [illegible] et al.
on Appeal of [illegible] T. [illegible],
Appellees.

[illegible] Appeal from [illegible] in Cook
[illegible] of Cook County.

[illegible]

[illegible] Opinion.

[illegible]. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal in Kenneth [illegible] Kenny, defendant, from a finding entered [illegible] of Cook County in favor of the [illegible], [illegible] Trust & Savings Bank, a corporation, in proceedings to foreclose a trust deed covering certain premises [illegible] and his wife.

[illegible] in the case are stated in an opinion in case No. [illegible], filed herewith, and the facts and conclusions of the court as [illegible] in [illegible] incorporated in this opinion.

It is [illegible] that certain tax [illegible] purchased by complainant [illegible] not under the [illegible] the premises. These [illegible] found in [illegible] belong to one E. A. Dawes. [illegible] the right under the [illegible] or tax title [illegible] purchaser had [illegible] might create a [illegible] them. [illegible] been sold for taxes and [illegible] identity [illegible] may acquire a title [illegible] notice. [illegible] v. [illegible].

It is [illegible] complainant had [illegible] affidavits that would not be [illegible] and will [illegible] the

property; that some of the certificates were over three years old when purchased. In support of these statements we are referred to several pages of the abstract of record and to an inspection of the original exhibits admitted in evidence. Nothing in the argument of counsel tends, in our opinion, to disclose any reason why these tax certificates, which were at least apparent liens against the property, should be held to be void. Clearly, at least as to certain of them, they constituted apparent liens against the property. The complainant was charged with knowledge that an outstanding tax certificate or tax deed might supersede the lien conferred upon the holder of the trust deed. Under the circumstances, complainant was justified in purchasing the certificates and in concluding that they were at the time of their purchase apparent liens against the premises. Defendant will not be heard to complain of the fact that no assignments appear with or upon the certificates of sale or receipted tax bills. It appears without question that, for whatever reason, defendants made little or no effort to protect the property from these tax liens for several years following the execution of the trust deed. Under the circumstances shown by the evidence complainant's possession of the certificates and receipts was sufficient. It is our opinion that no error was committed in entering the decree, and it is therefore affirmed.

AFFIRMED.

McSurely, P. J. and Matchett, J., concur.

property; that some of the certificates were over three years old when purchased. In support of these statements we are referred to several pages of the abstract of record and to an inspection of the original exhibits admitted in evidence. Nothing in the argument of counsel tends, in our opinion, to disclose any reason why these tax certificates, which were at least apparent liens against the property, should be held to be void. Clearly, at least as to certain of them, they constituted apparent liens against the property. The complainant was charged with knowledge that on outstanding tax certificate or tax deed might supersede the lien conferred upon the holder of the trust deed. Under the circumstances, complainant was justified in purchasing the certificates and in concluding that they were at the time of their purchase apparent liens against the premises. Defendant will not be heard to complain of the fact that no assignments appear with or upon the certificates of sale or recorded tax bills. It appears without question that, for whatever reason, defendant made little or no effort to protect the property from these tax liens for several years following the execution of the trust deed. Under the circumstances shown by the evidence complainant's possession of the certificates and receipts was sufficient. It is our opinion that no error was committed in entering the decree, and it is therefore affirmed.

AFFIRMED.

McSurely, P. J. and Matchett, J., concur.

26800

281 - 27239

SIG ENGEL,
Appellant,

vs.

MOIR HOTEL COMPANY and
MORRISON HOTEL AND RESTAURANT
COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 601

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal court of Chicago in favor of the defendants in an action begun by the plaintiff to recover the sum of $600, which sum, plaintiff alleged in a statement of claim, was delivered to defendants as innkeepers on August 14, 1920. It was also alleged in the statement that defendants had failed and refused on demand to return the $600 deposited with them. In an affidavit of merits the defendants denied that plaintiff had deposited with them the $600 or any sum of money. The case was tried by the court without a jury and judgment was entered in favor of defendants. Plaintiff appeals.

Plaintiff's evidence tends to show that on August 14, 1920, he was a guest at the Morrison Hotel in Chicago and on that date deposited with defendants' cashier the sum of $600; that defendants' cashier placed the money in an envelope, had plaintiff sign his name thereon and then delivered a stub torn from the envelope to plaintiff, which stub, plaintiff testified, was to be signed by him and presented to the cashier when plaintiff saw fit to demand his money. Plaintiff testified that he delivered the stub to the cashier and asked for his money on August 16, 1920; that the cashier made a search for the envelope containing the money and later informed

BID KNOEL,
Appellant,

vs.

NOIR HOTEL COMPANY and
MORRISON HOTEL AND RESTAURANT
COMPANY,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

A judgment was entered in the Municipal court of Chicago in favor of the defendants in an action begun by the plaintiff to recover the sum of $600, which sum, plaintiff alleged in a statement of claim, was delivered to defendants on August 14, 1930. It was also alleged in the statement that defendants had failed and refused on demand to return the $600 deposited with them. In an affidavit of merits the defendants denied that plaintiff had deposited with them the $600 or any sum of money. The case was tried by the court without a jury and judgment was entered in favor of defendants. Plaintiff appeals.

Plaintiff's evidence tends to show that on August 14, 1930, he was a guest at the Morrison Hotel in Chicago and on that date deposited with defendants' cashier the sum of $600; that defendants' cashier placed the money in an envelope, had plaintiff sign its name thereon and then delivered a receipt from the envelope to plaintiff, which stub, plaintiff testified, was to be signed by him and presented to the cashier when plaintiff saw fit to demand his money. Plaintiff testified that he delivered the stub to the cashier upon demand for his money on August 16, 1930; that the cashier made a search for the envelope containing the money and later informed

plaintiff that she did not know where it was; that plaintiff informed the hotel manager that he was unable to procure his money from the cashier, and that he, the assistant manager and the cashier again made search for the missing envelope. Plaintiff further testified that he was compelled to leave the city at once; that he so informed the hotel assistant manager, one Bowman, and the latter told him that "they would locate my money in the meantime and give it to me when I came back;" that plaintiff returned to the hotel the Saturday following and was informed by Bowman that they had not investigated the matter, as the cashier had reported sick Tuesday, the day after plaintiff left the hotel.

Plaintiff testified that he registered at the hotel for a third time a week later; that when he did so he called upon the vice-president, who told him to call again the same day at four o'clock. Plaintiff called as directed and was taken to a room in the hotel where he met the young lady who he says acted as cashier at the time he deposited the money; that when confronted by him she said, "I do not recall this man's face at all;" that he, plaintiff, then called her attention to an alleged statement made by her at the time plaintiff made the first demand for the money, to the effect that she had said that she "told the head cashier that she had placed it with the rest of the envelopes." The stub which plaintiff says was taken from the envelope was introduced in evidence. Plaintiff testified that he took the $600 from a vault in the Chamber of Commerce, where he kept about $5,000 in cash; that the money was to be used by him on a trip to New York, which he took the following week.

There is undisputed evidence in the record to the effect that the plaintiff, from October 19, 1919, to December

plaintiff that she did not know where it was; that plaintiff informed the hotel manager that he was unable to procure his money from the cashier, and that he, the assistant manager and the cashier again made search for the missing envelope. Plaintiff further testified that he was compelled to leave the city at once; that he so informed the hotel assistant manager, one Bowman, and the latter told him that "they would locate my money in the meantime and give it to me when I came back;" that plaintiff returned to the hotel the Saturday following and was informed by Bowman that they had not investigated the matter, as the cashier had reported sick Tuesday, the day after plaintiff left the hotel.

Plaintiff testified that he registered at the hotel for a third time a week later; that when he did so he called upon the vice-president, who told him to call again the same day at four o'clock. Plaintiff called as directed and was taken to a room in the hotel where he met the young lady who he says acted as cashier at the time he deposited the money; that when confronted by him she said, "I do not recall this man's face at all;" that he, plaintiff, then called her attention to an alleged statement made by her at the time plaintiff made the first demand for the money, to the effect that she had said that she "told the head cashier that she had placed it with the rest of the envelope." The stub which plaintiff says was taken from the envelope was introduced in evidence. Plaintiff testified that he took the $600 from a vault in the Chamber of Commerce, where he kept about $3,000 in cash; that the money was to be used by him on a trip to New York, which he took the following week.

There is undisputed evidence in the record to the effect that the plaintiff, from October 19, 1919, to December

19, 1920, had certain stock transactions involving an expenditure by him of several thousand dollars.

Catherine Fulkerson testified that in August, 1920, she was cashier at the Morrison hotel and that she was employed in that capacity on August 14, 1920; that she first saw plaintiff on the day he presented the stub for the envelope; that plaintiff did not deposit the $600 or any other sum with her August 14, 1920, or at any other time; that she first saw him August 16, 1920, at which time plaintiff presented the signed stub to her and demanded the envelope containing the money.

There is a direct contradiction between the testimony of the plaintiff and that of the cashier. The plaintiff's testimony, however, is supported by his possession of the stub. The cashier testified that no book account was kept of the receipt of money left with her for safe keeping; that the envelopes containing deposits were kept in a drawer and that each of two cashiers, a day cashier and a night cashier, had a key to this drawer. Miss Fulkerson testified that she left defendants' employ on the 18th or 19th of August, 1920.

There is evidence which tends to show that the defendants actually kept in their employ three cashiers, each of whom had access to the drawer in which was deposited money and valuables delivered to defendants, through their agents, by guests of the hotel; that the practice was to place deposits of money in envelopes from which a stub was removed and given to the depositor, who was required, upon demanding return of the deposit, to deliver the stub to the cashier with the depositor's signature written thereon for comparison with the signature of the depositor written on the envelope at the time of the deposit.

19, 1930, had certain stock transactions involving an expenditure by him of several thousand dollars.

Catherine Fullerton testified that in August, 1930, she was cashier at the Horizon Hotel and that she was employed in that capacity on August 14, 1930; that she first saw plaintiff on the day he presented the stub for the envelope; that plaintiff did not deposit the $600 or any other sum with her August 14, 1930, or at any other time; that the first sum was August 16, 1930, at which time plaintiff presented the signed stub to her and demanded the envelope containing the money.

There is a direct contradiction between the testimony of the plaintiff and that of the cashier. The plaintiff's testimony, however, is supported by his possession of the stub. The cashier testified that no book account was kept of the receipt of money left with her for safe keeping; that the envelopes containing deposits were kept in a drawer and that each of two cashiers, a day cashier and a night cashier, had a key to this drawer. Miss Fullerton testified that she left defendants' employ on the 14th or 15th of August, 1930.

There is evidence which tends to show that the defendants actually kept in their employ three cashiers, each of whom had access to the drawer in which was deposited money and valuables delivered to defendants, through their agent, by guests of the hotel; that the practice was to place deposits of money in envelopes from which a stub was removed and given to the depositor, who was required, upon demanding return of the deposit, to deliver the stub to the cashier who, by depositor's signature written thereon for comparison with the signature of the depositor written on the envelope at the time of the deposit.

Only one of these cashiers testified, and while it is true that she directly denies that she received the deposit, as testified to by plaintiff, it is our opinion that the prima facie case made by the plaintiff was not sufficiently met by the single denial by the cashier of plaintiff's testimony. Defendants offer no explanation of plaintiff's possession of the stub, which bore a number corresponding with the number on the envelope from which it was detached. The envelope should, according to defendants' practice, have remained in their possession even though the stub had in some way, accidentally or otherwise, been detached. Two persons at least had access to the drawer where the valuables of guests of the hotel were deposited; only one of such persons testified. Where, as in the present case, it appears that a hotel entertains guests and assumes to act as a depositor for money and valuables, every reasonable precaution should be taken to protect property so deposited. It is intimated only that plaintiff may have found or otherwise obtained the stub which he presented to the cashier, with his room number and signature thereon, at the time he demanded the return of the $600. Under the circumstances it is not quite enough to show that the person whom plaintiff says received the money now denies the receipt of it, and this is more particularly true where it appears, as it does here, that other persons had ample opportunity to gain possession of the money which plaintiff says was deposited with defendants. Plaintiff's evidence establishes a prima facie case in his favor, and it is our view that defendants failed to produce witnesses, whose absence is unexplained, who might have been able, if they saw fit to do so, to give some evidence touching the matter of fact in issue between the parties.

The judgment of the Municipal court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

Only one of these counters testified, and while it is true that she directly denies that she received the deposit, as testified to by plaintiff, it is our opinion that the prima facie case made by the plaintiff was not sufficiently met by the single denial by the cashier of plaintiff's testimony. Defendants offer no explanation of plaintiff's possession of the stub, which bore a number corresponding with the number on the envelope from which it was detached. The envelope should, according to defendants' practice, have remained in their possession even though the stub had in some way, accidentally or otherwise, been detached. Two persons at least had access to the drawer where the valuables of guests of the hotel were deposited; only one of such persons testified. Where, as in the present case, it appears that a hotel entertains guests and assumes to act as a depository for money and valuables, every reasonable precaution should be taken to protect property so deposited. It is intimated only that plaintiff may have found or otherwise obtained the stub which he presented to the cashier, with his room number and signature thereon, at the time he demanded the return of the money. Under the circumstances it is not quite enough to show that the person whom plaintiff says received the money has denied the receipt of it, and this is more conclusively true where it was not, or it does here, that other persons had ready opportunity [illegible] possession of the money which plaintiff says was deposited with defendants. Plaintiff's evidence satisfies us a prima facie case in his favor, and it is our view that defendants failed to produce witnesses, whose evidence is unexplained, who might have been able, if they saw fit so to do, to give some light in resolving the matter of fact in issue between the parties.

The judgment of the municipal court is reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

290 - 27248

MICHAEL BOROS, Sr., as Guardian of the Estate of Michael Boros, Jr., a Minor,
Appellee,

vs.

OLSON RUG COMPANY, a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Michael Boros, Jr., a minor, sustained serious injuries while in the employ of defendant, Olson Rug Company. Boros, by his guardian, his father, prosecuted suit in the Superior court of Cook County to recover damages for the injuries received by him and on a trial before a jury a verdict and judgment was entered in favor of plaintiff for $15,000. Defendant seeks to reverse the judgment by appeal to this court.

Plaintiff bases his right to recovery upon the allegations of two counts of an amended declaration and also an additional count filed thereto. The first count sets up in substance that Boros was employed by defendant at and about a certain dangerous and hazardous machine, known as a picker machine, in violation of Section 20 I of the Child Labor Act approved June 26, 1917. This section of the act contains a provision which prohibits the employment of minors under the age of sixteen years "in any capacity whatever in any employment that may be considered dangerous to their lives or limbs or where their health may be injured." Under the second count recovery is sought for a violation of Section 89, Chap. 48, Hurd's Illinois Statutes. This section is as follows:

> "That all power driven machinery, including all saws, planers, wood shapers, jointers, sand paper machines, iron mangles, emery wheels, ovens, furnaces, forges and rollers of metal; all projecting set screws on moving parts; all drums, cogs, gearing, belting, shaving tables, fly wheels, flying shuttles and hydro-extractors; all laundry machinery, mill gearing and machinery of every description, in any factory,

300 - 272AB

MICHAEL BOROS, Jr., as Guardian of the Estate of Michael Boros, Jr., a Minor,

Appellee,

vs.

GLSON RUG COMPANY, a Corporation,

Appellant.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

MR. JUSTICE DRAKE DELIVERED THE OPINION OF THE COURT.

Michael Boros, Jr., a minor, sustained serious injuries while in the employ of defendant, Olson Rug Company. Boros, by his guardian, his father, prosecuted suit in the Superior court of Cook County to recover damages for the injuries received by him and on a trial before a jury a verdict and judgment was entered in favor of plaintiff for $15,000. Defendant seeks to reverse the judgment by appeal to this court.

Plaintiff bases his right to recovery upon the allegations of two counts of an amended declaration and also an additional count filed thereto. The first count sets up in substance that Boros was employed by defendant at and about a certain dangerous and hazardous machine, known as a picker machine, in violation of Section 20 I of the Child Labor Act approved June 30, 1917. This section of the act contains a provision which prohibits the employment of minors under the age of sixteen years "in any capacity whatever in any employment that may be considered dangerous to their lives or limbs or where their health may be injured." Under the second count recovery is sought for a violation of Section 39, Chap. 48, Ill. Ill. Statutes. This section is as follows:

"That all power driven machinery, including all saws, planers, wood shapers, jointers, sand paper machines, iron machines, emery wheels, crows, turnscrew, torpedo and tailing of metal; all projecting set screws on moving parts; all drums, cogs, gearing, belting, shaving tables, fly wheels, flying shuttles and hydro-extractors; all laundry machinery, mill gearing and machinery of every description, in any factory,

mercantile establishment, mill or work shop, shall be so located, wherever possible, as not to be dangerous to employes, or shall be properly enclosed, fenced or otherwise protected."

The additional count charges that Boros at the time of his employment by defendant and at the time he received the injuries for which suit was brought was under the age of sixteen years and between the age of fourteen and sixteen years; that defendant, in violation of sections 20 and 20 C of the Child Labor Act, had employed him without complying with the sections of the act which prohibit employment of any minor over the age of fourteen and under the age of sixteen years unless there is first procured and placed on file in the place or establishment where such minor is employed an employment certificate issued as provided by the act and accessible to authorized officers of the State Department of Labor. Section 20 C of the act provides for the issuance of the employment certificate by persons authorized by the act.

The evidence shows that on June 29, 1919, Boros was employed by the defendant at and about the feeding of a machine operated by electric power, known as a picker machine. This machine consisted of a drum, about a foot and one-half in diameter and three or four feet in length, upon the surface of which were many metal teeth about an inch in length. The drum was attached to a shaft which was revolved by means of a pulley and belt. Immediately in front of the drum were two rollers which were operated by a system of cog wheels placed at the end of the machine. Boros was put to work in a room adjoining that in which the picker machine was located. His work was to place wool before the opening of a pipe into which wool would be drawn by air suction and carried through the pipe to the picker machine. When so employed he would occupy a position about 48 feet from the machine. The drum of the machine was covered except at the top, where a space of about 12 to 14 inches was open to permit pieces of dirt or other material to be thrown

mercantile establishment, mill or work shop, shall be so located, wherever possible, as not to be dangerous to employes, or shall be properly enclosed, fenced or otherwise protected."

The additional count charges that Boren at the time of his employment by defendant and at the time he received the injuries for which suit was brought was under the age of sixteen years and between the age of fourteen and sixteen years; that defendant, in violation of sections 30 and 30 C of the Child Labor Act, had employed him without complying with the sections of the act which prohibit employment of any minor over the age of fourteen and under the age of sixteen years unless there is first procured and placed on file in the place or establishment where such minor is employed an employment certificate issued as provided by the act and accessible to authorized officers of the State Department of Labor. Section 30 C of the act provides for the issuance of the employment certificate by persons authorized by the act.

The evidence shows that on June 22, 1919, Boren was employed by the defendant at and about the feeding of a machine operated by electric power, known as a picker machine. This machine consisted of a drum, about a foot and one-half in diameter and three or four feet in length, upon the surface of which were many metal teeth about an inch in length. The drum was attached to a shaft which was revolved by means of a pulley and belt. Immediately in front of the drum were two rollers which were operated by a system of cog wheels placed at the end of the machine. Boren was put to work in a room adjoining that in which the picker machine was located. His work was to place wool before the opening of a pipe into which wool would be drawn by air suction and carried through the pipe to the picker machine. When so employed he would occupy a position about 40 feet from the machine. The drum of the machine was covered except at the top, where a space of about 12 to 14 inches was open to permit pieces of dirt or other material to be thrown

out of the machine by the movement of the drum. The pipe into which Boros fed the wool led from the room where he was employed over a door between that room and the one in which the machine was placed and was brought down to a point near the west end of the machine where it opened into a chute from which the wool passed down to and between the rollers, which caused the wool to be fed into the drum; from there it passed through another pipe to a carding machine. The evidence tends to prove that the cogs which constituted a part of the picker machine were unguarded, and there is evidence from which the jury might conclude that proper guarding of these cogs was practicable.

Boros testified that he had been working for defendant for about six weeks before July 16, 1919, the day upon which he received his injuries; that he had been employed on a prior occasion by defendant for about four or five weeks; that he was then laid off; that about three days thereafter he went back to work again and was put to work "on the machine I got hurt on;" that he was employed by a Mr. Dobson, defendant's superintendent, and that nothing was said to him at any time up to the time he was hurt about his age. In describing the picker machine Boros said:

> "It stood on a structure, four wooden legs, and it was about a yard wide and a yard high, and there was a big drum there, a revolving drum, and that was to rip up rags, and there was two or three rolls in front where the rags went through, so the ripper could take them right out from the rolls as it passed through to rip them up. There was two or three rolls so that the rags could go in between them two rolls, and as they came out the ripper ripped them up. The ripper was a big drum with iron teeth in it like spikes."

He further testified that another large machine was located in the same room with the picker machines; that no one was employed to work on the machines during the week before the accident except himself; that sometimes the picker machine "got stuck once or twice or maybe three times a day, and sometimes it didn't get stuck at all;" that for some days

out of the machine by the movement of the drum. The pipe into which Doyle fed the wool led from the room where he was employed over a door between that room and the one in which the machine was placed and was brought down to a point near the back end of the machine where it passed into a chute from which the wool passed down to and between the rollers, which squeezed the wool to be fed into the drum; from there it passed through another pipe to a carding machine. The evidence tends to prove that the cogs which constituted a part of the picker machine were unguarded, and there is evidence from which the jury might conclude that proper guarding of these cogs was practicable.

Doyle testified that he had been working for defendant for about six weeks before July 16, 1910, the day upon which he received his injuries; that he had been employed on a prior occasion by defendant for about four or five weeks; that he was laid off; that about three days thereafter he went back to work again and was put to work "on the machine I got hurt on;" that he was employed by a Mr. Dobson, defendant's superintendent, and that nothing was said to him at any time as to the time he was hurt about his eye. In describing the picker machine Doyle said:

> "It stood on a stanchion, four wooden legs, and it was about a yard wide and a yard high, and there was a big drum there, a revolving drum, and [illegible] there was two or three rolls in front [illegible] so the rip or comb came right out [illegible] the rolls as it passed through to rip them up. There was in [illegible] three rolls so that the rags could go in between them two rolls, and as they came out the rippers ripped them up. The ripper was a big drum with iron teeth in it like spikes."

He further testified that the large machine was located in the same room with the picker and [illegible]; that no one was employed to work on the [illegible] before the accident except himself; that [illegible] the picker machine "got stuck once or twice on average [illegible] a day, and sometimes it didn't get stuck at all;" that for some days

after he first went to work feeding the wool to the conveyor pipe two or three men were engaged at or about the machines; that after they had quit work witness had to remove from the drum or rolls material which had at different times caused the machine to become clogged and to cease operating; that just before the time of the accident he, the witness, went to the left side of the machine to pull out certain material which had become clogged therein; that he removed this material from that side of the machine and that then he went to the other side and bent down, and as he did so his shirt became caught between the cog wheels; that at this time the machine was in operation; "it just threw, or pulled, my shirt together and took all my wind away. I tried to get myself up by putting my hand on top of a piece of tin back of the drum and my hand slipped and fell on the drum." The evidence shows that there was an open space above the drum about 12 or 14 inches wide. Plaintiff's hand and arm passed into the drum and that he received serious injuries thereby is conceded.

Plaintiff testified that there was no guard on the machine and none on the cog wheels, although the evidence shows than an L-shaped fence extended along the side of the machine and about a foot and a half therefrom.

There is a direct contradiction in the evidence as to whether Boros was permitted or directed to remove material from the drum or rolls at such times as the machine became clogged. His testimony is to the effect that defendant's foreman instructed him how to remove the material when the machine became clogged and while it was in motion; that he had followed the directions given on several occasions and that at certain times when he requested the foreman to do this work he was told by him, with some show of anger, to do it himself. Derr, the foreman, directly

after he first went to work feeding the wool to the conveyor pipe two or three men were engaged at or about the machine; that after they had quit work witness had to remove from the drum or rolls material which had at different times caused the machine to become clogged and to cease operating; that just before the time of the accident he, the witness, went to the left side of the machine to pull out certain material which had become clogged therein; that he removed this material from that side of the machine and that then he went to the other side and bent down, and as he did so his shirt became caught between the cog wheels; that at this time the machine was in operation; "it just threw, or pulled, my shirt together and took all my wind away. I tried to get myself up by putting my hand on top of a piece of tin back of the drum and my hand slipped and fell on the drum." The evidence shows that there was a open space above the drum about 12 or 14 inches wide. Plaintiff's hand and arm passed into the drum and that he received serious injuries thereby is conceded.

Plaintiff testified that there was no guard on the machine and none on the cog wheels, although the evidence shows than an 8-inched fence extended along the side of the machine and about a foot and a half therefrom.

There is a direct contradiction in the evidence as to whether Moore was satisfied or attempted to remove material from the drum or rolls at any time in the machine became clogged. His testimony is to the effect that defendant's foreman instructed him how to remove the material from the machine became clogged and while it was in action; that he had followed the directions given on several occasions [illegible] at certain [illegible] he requested the foreman to do the work he [illegible] a knit by him, with some show of anger, to do it himself. Here, the foreman, [illegible]

contradicted Boros' testimony by saying that Boros' only duty was to feed the wool to the conveyor pipe and that he was cautioned not to go near or to meddle with the machine. Derr's testimony is to some extent corroborated by that of other witnesses, but it is our opinion that the evidence on this point, even if the question may be thought to be material, was one for the jury.

Boros testified that he had never produced a school certificate for defendant; that he was born in Austro-Hungary January 12, 1904. It is earnestly urged on behalf of the defendant that believable evidence introduced on the trial shows that Boros was in fact over the age of sixteen years at the time he was injured July 16, 1919. On this question there is much conflict in the evidence. Boros' father and mother both testified that he was born January 12, 1904, and a baptismal certificate was introduced in evidence, over defendant's objection, which also tended to show that he was born on that date. Certain Chicago public school records which are required to be kept by law, recite that he was born upon different dates, one of them giving the date as February 14, 1903, another as January 2, 1903, and another as June 2, 1903. There is some evidence that in August, 1911, Boros' mother had given his age to an officer of a steamship upon which she and he had embarked for America as eight years, and that the same age was given at the port of entry. It is argued that the record made by the steamship official was probably caused by the fact that in giving the age of Boros his mother used the Hungarian word H-A-T, which is pronounced with the long sound of a and which translated into English means seven. It is further shown that one of the school records was corrected so as to give the date of Boros' birthh as January 12,1904, and there is evidence from which the jury might infer that this correction was made before he sustained his injuries. In any event, it is our view

contradicted Horse' testimony by saying that Horse' only duty was to feed the wool to the conveyor pipe and that he was cautioned not to go near or to meddle with the machine. Carr's testimony is to some extent corroborated by that of other witnesses, but it is our opinion that the evidence on this point, even if the question may be thought to be material, was one for the jury.

Horse testified that he had never produced a school certificate for defendant; that he was born in Austro-Hungary January 12, 1904. It is earnestly urged on behalf of the defendant that believable evidence introduced on the trial shows that Horse was in fact over the age of sixteen years at the time he was injured July 14, 1919. On this question there is much conflict in the evidence. Horse' father and mother both testified that he was born January 12, 1904, and a baptismal certificate was introduced in evidence, over defendant's objection, which also tended to show that he was born on that date. Certain Chicago public school records which are required to be kept by law, recite that he was born upon different dates, one of them giving the date as February 14, 1903, another as January 2, 1903, and another as June 2, 1903. There is some evidence that in August, 1911, Horse' mother had given his age to an officer of a steamship upon which she and he had embarked for America as eight years, and that the same age was given at the port of entry. It is argued that the record made by the steamship official was probably caused by the fact that in giving the age of Horse a mother used the Hungarian word H-A-T, which is pronounced with the long sound of a and which translated into English means seven. It is further shown that one of the school records was corrected so as to give the date of Horse' birth as January 12, 1904, and there is evidence from which the jury might infer that this correction was made before he sustained his injuries. In any event, it is our view

that under the evidence the question of Boros' age was one which the trial Judge properly left for determination by the jury. No attempt was made to show, except by the impeaching evidence referred to, that Boros was more than sixteen years of age at the time he was injured. Whether the school records were made in error, or whether the persons upon whose testimony the records were made consciously misinformed the school authorities for some ulterior purpose, or whether the records in fact speak the truth, were questions to be considered by the jury in determining Boros' age. Assuming than, as we do, that there is sufficient evidence in the record to warrant a conclusion that Boros was between the ages of fourteen and sixteen years at the time he was injured, the question arises as to whether the defendant is legally liable for the injuries sustained by him.

In the case of American Car Co. v. Armentraut, 214 Ill. 509, the Supreme Court said:

> "Appellant also questions the refusal of an instruction to the effect that if the appellee, knowing that he was under the age of fourteen years, obtained his employment by falsely representing that he was sixteen years of age, he cannot take advantage of his false statement and recover in this action, and it is said that this instruction should have been given, on the theory that the law will not permit a plaintiff to recover where his own unlawful act concurs in causing the injury of which he complains.
>
> "This doctrine is not applicable for the reason that the statute under consideration is aimed at the master and not at the servant. The act of the child in accepting or entering into the employment is not unlawful. Moreover, if the child's statement to the effect that he was above the age of sixteen would constitute a defense, the law could never be enforced in any case where the child was willing to make a false statement in reference to his age for the purpose of obtaining the employment."

Testimony offered on behalf of the defendant is to the effect that Boros said he was nineteen years of age at the time of his employment by defendant; this testimony is directly denied by him; but whatever the truth may be in this matter, under the decisions of the Supreme court of this State it is immaterial what he may have said at the time of his employment by defendant

that under the evidence the question of Horne's age was one which the trial Judge properly left for determination by the jury. No attempt was made to show, except by the impeaching evidence referred to, that Horne was more than sixteen years of age at the time he was injured. Whether the school records were made in error, or whether the persons upon whose testimony the records were made consciously misinformed the school authorities for some sinister purpose, or whether the records in fact speak the truth, were questions to be considered by the jury in determining Horne's age. Assuming then, as we do, that there is sufficient evidence in the record to warrant a conclusion that Horne was between the ages of fourteen and sixteen years at the time he was injured, the question arises as to whether the defendant is legally liable for the injuries sustained by him.

In the case of American Car Co. v. Armentrout, 214 Ill. 509, the Supreme Court said:

> "Appellant also questions the refusal of an instruction to the effect that if the appellee, knowing that he was under the age of fourteen years, obtained his employment by falsely representing that he was sixteen years of age, he cannot take advantage of his false statement and recover in this action, and it is said that this instruction should have been given, on the theory that the law will not permit a plaintiff to recover where his own unlawful act concurs in causing the injury of which he complains.
>
> "This doctrine is not applicable for the reason that the statute under consideration is aimed at the master and not at the servant. The act of the child in accepting or entering into the employment is not unlawful. Moreover, if the child's statement to the effect that he was above the age of sixteen would constitute a defense, the law would never be enforced in any case where the child was willing to make a false statement in reference to his age for the purpose of obtaining the employment."

Testimony offered on behalf of the defendant is to the effect that Horne said he was nineteen years of age at the time of his employment by defendant; this testimony is directly denied by him; but whatever the truth may be in this matter, under the decisions of the Supreme court of this State it is immaterial what he may have said at the time of his employment by defendant

if it be assumed that he was under the age of sixteen years at the time he was employed, and that defendant had not procured an employment certificate, as required by the act. Evidence for the defendant that its foreman had never instructed Boros how to take meterial from between the rolls in front of the drum; that he, the foreman, had ordered Boros to keep away from the machine and that Boros had said at the time of his employment that he was nineteen years of age, in view of the decisions of the Supreme Court of this State, becomes immaterial.

In the case of Roszek v. Bauerle & Stark Co., 232 Ill. 561, it was held that it wasno more legal to permit a minor between fourteen and sixteen years of age to be employed in a factory without the permit required by law, then it was to employ a minor under fourteen years of age, whose employment, under the law, in mercantile establishments is prohibited. In deciding the case the court said:

> "In this case the plea did not aver that any permit had been obtained authorizing plaintiff's employment for any purpose, and, as we understand the record, the proof shows no such permit was obtained. Without such permit he was no more legally permitted to work in defendant's factory than would be a minor under fourteen years of age. In the one case a minor is not legally permitted to work at all, while in the other he is only legally permitted to work upon obtaining the permit required by the Child Labor Law."

An employer is not permitted to violate the law merely because an employee may have misrepresented his age. The duty imposed upon the employer not to employ minors between fourteen and sixteen years of age without first obtaining the necessary permit therefor is absolute. The salutary purpose of the law is to protect minors in circumstances such as appear to have caused the injuries to Boros.

The Child Labor Act also provides that minors under the age of sixteen years may not be employed in any capacity whatever in any employment that may be considered dangerous to their lives or limbs or where their health may be injured. The

If it be assumed that he was under the age of sixteen years at the time he was employed, and that defendant had not procured an employment certificate, as required by the act. Evidence for the defendant : that its foreman had never instructed Perez how to take material from between the rolls in front of the press; that he, the foreman, had ordered Perez to keep away from the machine and that Perez had said at the time of his employment that he was nineteen years of age, in view of the decisions of the Supreme Court of this State, becomes immaterial.

In the case of Morris v. Beverly & Stark Co., 224 Ill. 561, it was held that if verse were legal to permit a minor between fourteen and sixteen years of age to be employed in a factory without the permit required by law, then it was to employ a minor under fourteen years of age, whose employment, under the law, in manufacture establishments is prohibited. In deciding the same the court said:

> "In this case the plaintiff did not aver that any permit had been obtained authorizing plaintiff's employment for any purpose, and, as we understand the record, the proof shows no such permit was obtained. Without such permit it was no more legally permitted to work in defendant's factory than would be a minor under fourteen years of age. In the one case a minor is not legally permitted to work at all, while in the other he is only legally permitted to work upon obtaining the permit required by the Child Labor Law."

An employer is not permitted to violate the law merely because an employee may have misrepresented his age. The duty imposed upon the employer not to employ minors between fourteen and sixteen years of age without first obtaining the necessary permit therefor is absolute. The statutory purpose of the law is to protect minors in circumstances such as appear to have caused the injuries to Perez.

The Child Labor Act also provides that minors under the age of sixteen years may not be employed in any capacity whatever in any employment that may be considered dangerous to their lives or limbs or where their health may be injured. The

evidence shows that the gears attached to the machine in question were unguarded; that an open space 12 to 14 inches wide extended above the drum and that the picker machine and another large machine were located within 48 inches of each other. It is true that Boros' work was in an adjoining room about 50 feet away from the picker machine. He was compelled, however, in passing to and from his place of employment to pass in the space between the two machines, and he insists that he was required in the usual course of his employment, under the directions of his foreman, to remove material from the drum and rolls when the machine became clogged. We think the evidence is sufficient to warrant the conclusion that the defendant was employed in a place that might be considered dangerous to his life or limbs.

In the well considered case of Stratford v. Republic Iron Co., 238 Ill. 373, it was contended that it was incumbent upon a minor to prove that he was in the exercise of due care, and that he could not recover if at the time of the accident he was doing work he was not authorized to perform or that he had been forbidden to do. In answering this contention the Supreme Court said:

> "In the Armentraut case we held that an employer must know, at his peril, that children employed by him are of an age that he may lawfully employ them. *** Appellant, assuming the fact to be as contended by it, that appellee had of his own accord left the work he was employed and directed to do and engaged in work he was forbidden to perform when injured, argues that there is no more reason for saying his injury resulted from his employment than there would be if he had, while in appellant's employment, been struck by lightning. It is true, liability does not depend, alone, upon the employment, but the injury must be a consequence of such employment. The mere fact that a child employed in violation of the law receives an injury in nowise resulting from the employment, would not create a liability. But such is not the case here. The vital and distinguishing fact here is that appellee was employed by appellant to labor in its manufacturing establishment and while engaged in performing services for it in said establishment he was injured. He was in appellant's plant by virtue of his employment to work for it, and the fact that he may have temporarily abandoned the work he was employed and directed to do and engaged in a forbidden line, we think does not destroy

evidence shows that the gears attached to the machine in question were unguarded; that an open space 12 to 14 inches wide existed above the drum and that the picker machine and another large machine were located within 48 inches of each other. It is true that Moroe' work was in an adjoining room about 80 feet away from the picker machine. He was compelled, however, in passing to and from his place of employment to pass in the space between the two machines, and he insists that he was required in the usual course of his employment, under the directions of his foreman, to remove material from the drum and rolls when the machine became clogged. We think the evidence is sufficient to warrant the conclusion that the defendant was employed in a place that might be considered dangerous to his life or limbs.

In the well considered case of Hartford v. Hamilton Iron Co., 228 Ill. 374, it was contended that it was incredible upon a minor to prove that he was in the exercise of due care, and that he could not recover if at the time of the accident he was doing work he was not authorized to perform or that he had been forbidden to do. In answering this contention the Supreme Court said:

"In the Armentrout case we held that an employer must know, at his peril, that children employed by him, of an age that he may lawfully employ them. In Ashlin v. Chicago, the fact to be considered is, that superior and of his own accord left the work he was employed and lingered in and engaged in work he was forbidden to perform when injured. Appellee argues that there is no more reason for saying the injury resulted from his employment than there would be if he had, while in appellant's employment, been struck by lightning. It is true, liability does not depend, alone, upon the employment, but the injury must be a consequence of such employment. The mere fact that a child employed in violation of the law receives an injury in novise resulting from the employment, would not create a liability. But such is not the case here. The vital and distinguishing fact here is that he was employed by appellant to labor in the manufacturing establishment and while engaged in performing services for it in said establishment he was injured. He was in appellant's plant by virtue of his employment to work for it, and the fact that he was temporarily abandoned the work he was employed and directed to do and engaged in a forbidden line, we think does not destroy

the causal relation between the employment and the injury, and if it does not, contributory negligence of appellee would constitute no defense, and the court did not err in refusing to submit that question to the jury. It is imposing no harsh burden on appellant to hold that having unlawfully employed the appellee to labor in its plant it is liable to him for any injury received by him resulting from the performance of services for it, whether those services were in the line he was directed to perform or not. The law forbids the employment of children in any capacity in such establishments as appellant's, and it is contrary to the spirit of the law to say that the consequences of its wilful violation may be avoided by showing that the child left the work given it to perform and negligently undertook to do something else, which resulted in the injury."

The case of McNally v. Standard Railway Equipment Co., 165 Ill. App. 371, is relied upon and seems to be in support of defendant's position. We are inclined, however, to rest our decision upon later decisions by our Supreme Court.

We do not think the trial court erred in admitting the baptismal certificate. There is some basis for the argument that the objection made to the introduction of this certificate was too general in its nature. The point was not specifically made on the trial that the certificate was not duly certified as required under section 20 D of the Child Labor act. Paragraph B of that section provides that a baptismal certificate or transcript of the record, duly certified, showing the date of birth, place of baptism, etc., is admissible as evidence of age. The certificate appears to have been executed by Sabon Cornell, Record Keeper and Rector, and bears a seal upon which is inscribed the name of the priest who performed the ceremony of baptism. The foreign law which purports to authorize the making of the baptismal record was introduced in evidence. The objections made to this proof are technical and, in our opinion, should not cause a reversal of the judgment. The foreign law as interpreted was read in the presence of the jury. This was not proper practice, as the question of the admissibility of the certificate was solely

the casual relation between the employment and the injury, and if it does not, contributory negligence of the [illegible] constitute a defense, and the court did not err in [illegible] submit that question to the jury. It is logical, in deciding burden on respondent to show that knowing, willfully engage in the appellee in labor [illegible] that it is liable to him for any injury received by him resulting from the said failure of employer [illegible], where, if the services were in the line he was directed to perform or not. The law forbids the employment of children in any manner in such [illegible] as appears", [illegible] that the consequences of his willful act [illegible] may be avoided by showing that the child had the mental [illegible] to perform and negligently neglected to [illegible] place, which resulted in the injury."

The case of GORMAN v. [illegible]

Co., 18[illegible] [illegible] of defendant's [illegible] to wear our [illegible] detention upon [illegible]

[illegible]

the Supreme [illegible] that the obstruction [illegible] was too remote [illegible] made on the [illegible] required under a [illegible] of that section [illegible] of the record, [illegible] of hospital, etc., [illegible] date upon a to [illegible] and doctor, and [illegible] the point [illegible] law which [illegible] record was [illegible] proof are [illegible] verdict of the [illegible] in the presence of the jury. [illegible] the question of the [illegible]

for the court, but we do not think this error could have influenced the jury in any degree for or against either party.

It is argued that the court erred in giving to the jury plaintiff's instruction No. 3 on the subject of damages. A part of this instruction told the jury that plaintiff might recover for

> "his loss of time and inability to work and transact business, after he reaches the age of 21, if any, on account of such injuries, and such future loss of time and inability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries."

It is said that this instruction would permit the plaintiff to recover because of inability to work between the date of the trial and his 21st birthday. He was nineteen years of age at the time the case was tried. The objection made to the instruction, is, we think, sufficiently answered by the decision of the Supreme Court in the case of American Car Co. v. Hill, 226 Ill. 236, where it is said:

> "The suit was brought in the name of the father as next friend, and we are of the opinion if said instruction, which is not as broad as the instruction in the Richardson case, is held to permit a recovery by the appellee for the loss of time and inability to work during his minority, that the father, by permitting the suit to be brought and prosecuted in his name as next friend and by procuring said instruction to be given to the jury, estopped himself from thereafter recovering damages from the appellant for the loss of time and inability to work of the appellee, occasioned by said injury, during the minority of the appellee."

In the case of Chicago Screw Co. v. Weiss, 203 Ill. 541, the court held that:

> "The parent may relinquish his right to the earnings of his child, and that he has done so may be inferred from the conduct of the parent (21 Am. & Eng. Ency. of Law, 2nd ed. 1059), and the prosecution of a suit in the name of the child by the father as next friend, for the recovery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the authority to collect or claim such earnings in his own right."

West Chicago St. R. R. Co. v. Johnson, 180 Ill. 286; Chicago City Ry. Co. v. Gemmill, 209 Ill. 641.

Other objections made to the instruction are not

for the court, but we do not think this error could have influenced the jury in any degree for or against either party.

It is argued that the court erred in giving to the jury plaintiff's instruction No. 2 on the subject of damages. A part of this instruction told the jury that plaintiff might recover for

> "his loss of time and inability to work and transact business, after he reaches the age of 21, if any, on account of such injuries, and such future loss of time and inability to work, if any, which the jury may believe from the evidence he will sustain on account of such injuries."

It is said that this instruction would permit the plaintiff to recover because of inability to work between the date of the trial and his 21st birthday. He was eighteen years of age at the time the case was tried. The objection made to the instruction, is, we think, sufficiently answered by the decision of the Supreme Court in the case of Chicago Ger. Ry. v. Hill, 232 Ill. 229, where it is said:

> "The suit was brought in the name of the father as next friend, and we are of the opinion, if such instruction, which is not as broad as the instruction in the Chicago v. case, is held to permit a recovery by the minor for the loss of time and inability to work during his minority, that the jury, by permitting the suit to be brought and prosecuted in his name as next friend and by executing such instruction to be given to the jury, stopped himself from thereafter recovering damages from the appellee for the loss of time and inability to work of the appellee, occasioned by said injury, during the minority of the appellee."

In the case of Chicago Ger. Ry. v. Hill, 232 Ill. 229, the court held that:

> "The parents may relinquish his right to the earnings of his child, and that he has done so in, by interfering from the conduct of the parent (21 Am. & Eng. Ency. of Law, 2nd ed. 1089), and the prosecution of a suit in the name of the child by the father as next friend, for the recovery of the earnings of the minor, would be equivalent to a relinquishment on the part of the father of the authority to collect or claim such earnings in his own right."

East Chicago St. R. R. Co. v. Johnson, 13 Ill. App. Ginger City Ry. Co. v. Donnelly, 208 Ill. 661.

Other objections made to the instruction are not

tenable. It is argued that there is no evidence in the record tending to show that Boros sustained, as a result of the accident, any injury to his health. It is conceded that he sustained serious and permanent injuries to his left hand and wrist, and it is a fair inference from the evidence that as a result of the injuries he has permanently lost a large part of the use of his arm and hand. This objection was raised and answered in the case of Kennedy v. Swift & Co., 234 Ill. 612, where the Supreme Court said:

> "One arm of the appellee was broken and the wrist of the other severely sprained and the tongue of the appellee bitten through. He was a strong, healthy man, under thirty years of age at the time he was injured, and at the time of the trial, which occurred several months subsequent to his injury, as a result of the fall he was unable to perform manual labor. It is therefore apparent that there was evidence in the record upon which to base the said instruction."

No reversible error was committed in giving or refusing to give certain other instructions.

The point is made that the verdict and judgment are for an excessive amount. It is admitted in the briefs filed on behalf of defendant that the plaintiff sustained very severe injuries. The evidence tends to show that as a result of the accident plaintiff lost all of his left hand except the index finger and thumb as also part of his wrist. The jury were warranted in concluding that as a result of the accident the plaintiff's arm and hand were seriously and permanently injured.

While the verdict is large it cannot be said that it was caused by passion, prejudice or sympathy on the part of the jury. Other alleged errors are urged, but it is our opinion on the whole record that no such error is shown as would warrant a reversal of the judgment.

The judgment of the Superior court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

tenable. It is argued that there is no evidence in the record tending to show that Moses sustained, as a result of the accident, any injury to his health. It is contended that he sustained serious and permanent injuries to his left hand and wrist, and it is a fair inference from the evidence that as a result of the injuries he has permanently lost a large part of the use of his arm and hand. This objection was raised and answered in the case of Kennedy v. Ruff & Co., 224 Ill. 612, where the Supreme Court said:

> "One arm of the appellee was broken and the wrist of the other severely scratched and the tongue of the appellee bitten through. He was a strong, healthy man, under thirty years of age at the time he was injured, and at the time of the trial, which occurred several months subsequent to his injury, as a result of the fall he was unable to perform manual labor. It is therefore apparent that there was evidence in the record upon which to base the said instruction."

No reversible error was committed in giving or refusing to give certain other instructions.

The point is made that the verdict and judgment are for an excessive amount. It is contended in the brief filed on behalf of defendant that the plaintiff sustained very severe injuries. The evidence tends to show that as a result of the accident plaintiff lost all of his left hand except the index finger and thumb as also part of his wrist. The jury were warranted in concluding that as a result of the accident the plaintiff's arm and hand were seriously and permanently injured.

While the verdict in large it cannot be said that it was caused by passion, prejudice or misapprehension on the part of the jury. Other alleged errors are urged, but it is our opinion on the whole record that no such error in law is shown as would warrant a reversal of the judgment.

The judgment of the superior court is affirmed.

AFFIRMED.

McSurely, P. J., and McDonald, J., concur.

299 - 27257

EDSON FLORSHEIM,
Appellee,

vs.

EDWARD LASHAM CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 601

MR. JUSTICE DRVER DELIVERED THE OPINION OF THE COURT.

April 16, 1921, plaintiff, Edson Florsheim, was riding in an automobile in a northerly direction on Normal boulevard, in the city of Chicago. As plaintiff attempted to cross Fifty-ninth street his automobile was struck by defendant's truck, which was at that time being driven west on that street.

In a statement of claim filed in the Municipal court of Chicago the plaintiff set up that the car in which he was riding at the time of the accident was so damaged by the collision that he was compelled to expend $546.25 for repairs thereon. On a trial judgment was entered in favor of plaintiff for $546.25. The defendant brings the case by appeal to this court. The evidence introduced on the trial shows that the collision occurred at the intersection of Fifty-ninth street, an east and west street, and Normal boulevard, which runs north and south. At the time of and just before the accident the plaintiff was driving a touring car north on Normal avenue, and defendant, by its employe, was operating a truck west in the northerly track of two street railway tracks in Fifty-ninth street. The plaintiff testified that as he approached the street to cross Fifty-ninth street his car was moving from 15 to 18 miles an hour; that he had a clear vision of the intersection, but that he did not see the truck until he, the witness, had passed the south curb line of Fifty-ninth street; that at this time the

309 - 27297

EDSON MORENHEIM, Appellee, vs. EDWARD MARSHAL CO., a Corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

SPECIAL 501

MR. JUSTICE MAYER DELIVERED THE OPINION OF THE COURT.

April 16, 1921, plaintiff, Edson Morenheim, was riding in an automobile in a northerly direction on Normal boulevard, in the city of Chicago. As plaintiff attempted to cross Fifty-ninth street his automobile was struck by defendant's truck, which was at that time being driven west on that street.

In a statement of claim filed in the Municipal court of Chicago the plaintiff set up that the car in which he was riding at the time of the accident was so damaged by the collision that he was compelled to expend $310.00 for repairs thereon. On a trial judgment was entered in favor of plaintiff for $240.00. The defendant brings the case by appeal to this court. The evidence introduced on the trial shows that the collision occurred at the intersection of Fifty-ninth street, an east and west street, and Normal boulevard, which runs north and south. At the time of and just before the accident the plaintiff was driving a touring car north on Normal avenue, and defendant, by its employe, was operating a truck west in the northerly track of two street railway tracks in Fifty-ninth street. The plaintiff testified that as he approached the street to cross Fifty-ninth street his car was moving from 15 to 18 miles an hour; that he had a clear vision of the intersection, but that he did not see the truck until he, the witness, had passed the south curb line of Fifty-ninth street; that at this time the

truck was at the east curb line of the boulevard and driving west on the westbound car track; that when he, the witness, was six or eight feet from the truck he saw that the latter was not going to stop; that witness then turned his car toward the west, the direction in which the truck was moving, to avoid the collision; that the truck did not attempt to stop or to turn out of the track, but ran into plaintiff's car, striking it on the right hand side. The only testimony touching the speed of the truck is that of one Gunar, who was riding in plaintiff's car and who testified that "it was coming about the same speed we were going." The evidence then shows that both vehicles were approaching the intersection, each traveling at about 15 to 18 miles an hour. It appears from plaintiff's own testimony that just before and at the time of the accident he failed to comply with Section 33 of the Motor Vehicle Law. Defendant's motor truck was being driven westward on Fifty-ninth street at a rate of speed no greater than that at which plaintiff's automobile was moving. The truck was also approaching the intersection upon plaintiff's right, and it was the duty of plaintiff, under the law and under the circumstances as shown by the evidence, to give the truck the right of way over the intersection.

The facts in the case are not disputed, and from plaintiff's testimony it appears that the damage to the car was caused by plaintiff's failure to comply with the law. In view of our opinion that on the admitted facts of the case there can be no recovery in favor of the plaintiff, it will be unnecessary to consider other questions presented in the brief filed for defendant.

The judgment of the Municipal court is reversed, with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely, P. J., and Matchett, J., concur.

truck was at the east curb line of the boulevard and driving west on the westbound car track; that when he, the witness, was six or eight feet from the truck he saw that the latter was not going to stop; that witness then turned his car toward the west, the direction in which the truck was moving, to avoid the collision; that the truck did not attempt to stop or to turn out of the track, but ran into plaintiff's car, striking it on the right hand side. The only testimony touching the speed of the truck is that of one Gunar, who was riding in plaintiff's car and who testified that "it was coming about the same speed we were going." The evidence shows that both vehicles were approaching the intersection, each traveling at about 12 to 15 miles an hour. It appears from plaintiff's own testimony that just before and at the time of the accident he failed to comply with Section 23 of the Motor Vehicle Law. Defendant's motor truck was being driven westward on Fifty-ninth street at a rate of speed no greater than that at which plaintiff's motorcycle was moving. The truck was also approaching the intersection upon plaintiff's right, and it was the duty of plaintiff, under the law and under the circumstances as shown by the evidence, to give the truck the right of way over the intersection.

The facts in the case are not disputed, and from plaintiff's testimony it appears that the damage to the car was caused by plaintiff's failure to comply with the law. In view of our opinion that on the admitted facts of the case there can be no recovery in favor of the plaintiff, it will be unnecessary to consider other questions presented in the brief filed for defendant.

The judgment of the municipal court is reversed, with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely, P. J., and Marchant, J., concur.

299 - 27257 FINDING OF FACT.

We find as a fact that the plaintiff was guilty of contributory negligence in his failure to give defendant's motor truck the right of way over the street intersection.

FINDING OF FACT.

We find as a fact that the plaintiff was guilty of contributory negligence in his failure to give defendant's motor truck the right of way over the street intersection.

402 - 27360

SAM COHEN,
Appellee,

vs.

THE WESTERN STORAGE, VAN COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 601

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago to recover the sum of $285.00 which he alleged in a statement of claim was due him from defendant because of the alleged negligence of the latter, a warehouseman, in carting and storing certain rugs, statuary and cut glass, the property of plaintiff. A judgment was entered in the case in favor of the plaintiff for $99.00, and defendant appeals.

Evidence introduced on the trial shows that March 21, 1919, plaintiff delivered eight rugs and certain statuary and cut glass to the defendant for storage. In July, 1920, the property was delivered by defendant to plaintiff, and the latter testified that the rugs when delivered to him were not in the same condition they were in when delivered to defendant; that they were moth eaten to the extent that seven of them had become worthless. While there was some evidence of slight damage to the statuary and cut glass while in defendant's care, it is evident that the court entered judgment in plaintiff's favor on the theory that defendant, by entering into the contract with plaintiff for the storage of the goods, had become an insurer thereof, and in this we think the court erred.

There is no evidence at all in the record that the defendant in the care of the property had failed to exercise ordinary care. Defendant's assistant manager testified that all of

402 - 27260

SAM COHEN, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
THE MERCHANTS GENERAL [illegible], a Corporation, ARD [illegible], Appellant.	

MR. JUSTICE DRAKE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago to recover the sum of $225.00 which he alleged in a statement of claim was due him from defendant because of the alleged negligence of the latter, a warehouseman, in carting and storing certain rugs, stationary and cut glass, the property of plaintiff. A judgment was entered in the case in favor of the plaintiff for $99.00, and defendant appeals.

Evidence introduced on the trial shows that March 21, 1910, plaintiff delivered eight rugs and certain stationary and cut glass to the defendant for storage. In July, 1920, the property was delivered by defendant to plaintiff, and the latter testified that the rugs when delivered to him were not in the same condition they were in when delivered to defendant; that they were moth eaten to the extent that seven of them had become worthless. While there was some evidence of slight damage to the stationary and cut glass while in defendant's care, it is evident that the court entered judgment in plaintiff's favor on the theory that defendant, by entering into the contract with plaintiff for the storage of the goods, had become an insurer thereof, and in this we think the court erred.

There is no evidence at all in the record that the defendant in the case of the property had failed to exercise ordinary care. Defendant's assistant manager testified that all of

the property received by plaintiff was separately kept in a room in defendant's warehouse and that during the time it was there defendant took every reasonable precaution to protect it from damage. An expert testifying for plaintiff said that rugs are very subject to be eaten by moths; and it was stipulated on the trial that an absent witness for defendant would testify if present that there is no way in the warehouse business to guard against moths; that in this particular case "every precaution known to the storage business was used to prevent it."

Section 261, chap. 114, Hurd's Revised Illinois Statutes, provides that:

> "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

The evidence is uncontradicted that the defendant exercised at least ordinary care to prevent damage to the property delivered to it by the plaintiff. There is some evidence of slight damage to the statuary and glassware delivered to defendant, but this damage is not by any means sufficient to account for the judgment rendered in plaintiff's favor. It is shown in the abstract of record that the trial Judge was of the opinion, in that it appeared that the rugs were delivered to the defendant in good condition, that the latter became an insurer thereof and was bound absolutely to restore the property to plaintiff in the condition it was in when received by defendant. This is not the law. The statute specifically provides that the defendant was required under the law to exercise only ordinary care to protect the property.

In the case of St. John v. Ill. Cent. R. R. Co., 168 Ill. App. 599, it was held that a warehouseman is required to

the property received by plaintiff was separately kept in a room in defendant's warehouse and that during the edge it was there defendant took every reasonable precaution to protect it from damage. An expert testify [illegible] plaintiff said that tugs are very subject [illegible] action by motion; and it was explained on the [illegible] that an absent witness for defendant would testify if present that there is no way in the warehouse business to guard against motion; that in this particular case "every precaution known to the storage business was used to prevent it."

Section 101, chap. 114, Rev'd Statutes Illinois Statutes, provides that:

> "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable in the absence of an agreement to the contrary, for any loss or injury to the goods which could not have been avoided by the exercise of such care."

The evidence is uncontradicted that the defendant exercised at least ordinary care to prevent damage to the property delivered to it by the plaintiff. There is some evidence of slight damage to the statuary and glassware delivered to defendant, but this damage is not in any case sufficient to account for the judgment rendered in plaintiff's favor. It is shown in the abstract of record that the trial Judge was of the opinion, in that it appeared that the rugs were delivered to the defendant in good condition, that the latter became an insurer thereof and was bound absolutely to restore the property to plaintiff in the condition it was in when received by defendant. This is not the law. The statute specifically provides that the defendant was required under the law to exercise only ordinary care to protect the property.

In the case of St. John v. Ill. Cent. R. R. Co., 140 Ill. App. 390, it was held that a warehouseman is required to

use ordinary care and diligence in the preservation of property committed to its care. Miles v. International Hotel Co., 289 Ill. 320.

The judgment of the Municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

use ordinary care and diligence in the preservation of property committed to its care. *Miles* v. *International Hotel Co.*, 209 Ill. 390.

The judgment of the municipal court will be reversed and the cause remanded to that court for a new trial.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

415 - 27373

L. L. COOKE,
Appellee,

vs.

WILLIAM E. COATS, JOSEPH LIBAL, Jr., and JOSEPH LIBAL, Sr.,
Defendants.

WILLIAM E. COATS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, William E. Coats, appeals from a judgment rendered against him in the Municipal Court of the City of Chicago in favor of the plaintiff, L. L. Cooke, for the sum of $340. The case was tried by a jury and evidence was introduced on behalf of the plaintiff which tended to prove that a collision occurred at streets intersection in the City of Chicago between an automobile owned and operated by the plaintiff and one operated by Joseph Libal, Jr. The car operated by Libal was owned by the defendant.

No question is raised in the briefs filed in the case as to whether sufficient evidence was introduced to warrant a finding that the damage done plaintiff's car in the collision was not caused by the negligence of the driver of defendant's car. The only important question presented to us is whether on the evidence the court should have instructed the jury to find the issues for the defendant on the ground that plaintiff's evidence failed to show that at the time the accident occurred defendant's car was being operated by him or his agent. In defendant's brief it is

415 - 27273

L. L. COOKE,
Appellee,

vs.

WILLIAM E. COATS, JOSEPH LIBAL,
Jr., and JOSEPH LIBAL, Sr.,
Defendants.

WILLIAM E. COATS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT.

The defendant, William E. Coats, appeals from a judgment rendered against him in the Municipal Court of the City of Chicago in favor of the plaintiff, L. L. Cooke, for the sum of $240. The case was tried by a jury and evidence was introduced on behalf of the plaintiff which tended to prove that a collision occurred at Ainslie Intersection in the City of Chicago between an automobile owned and operated by the plaintiff and one operated by Joseph Libal, Jr. The car operated by Libal was owned by the defendant.

No question is raised in the briefs filed in the case as to whether sufficient evidence was introduced to warrant a finding that the damage done plaintiff's car in the collision was not caused by the negligence of the driver of defendant's car. The only important question presented to us is whether on the evidence the court should have instructed the jury to find the issues for the defendant on the ground that plaintiff's evidence failed to show that at the time the the accident occurred defendant's car was being operated by him or his agent. In defendant's brief it is

admitted that defendant was not operating the car himself at the time of the accident. It is asserted, however, that the accident occurred a short time after defendant had been using his car for the pleasure of himself and his family; that in accordance with his usual custom defendant had turned his car over to his agent, Joseph Libal, Jr., to take it back to the garage where it was kept. The undisputed evidence shows that defendant's car was not being operated by him or by any person authorized by him to operate it at the time and place where the accident occurred. The only evidence introduced by the plaintiff which tends to show defendant's ownership of the car or his participation in the accident is that of the plaintiff who said that one of the occupants of the car which collided with his gave the witness the name of William E. Coats. P. C. Reed, the only other occurrence witness, testified that Mr. Coats, the defendant, was not in the car or present at the time the accident occurred. On this showing the court at the close of plaintiff's case should have instructed the jury to return a verdict for the defendant.

The uncontradicted evidence on behalf of the defendant is to the effect that he lives at 631 Sheridan Road, Chicago, and that he kept his automobile at a garage at 3635 N. Halsted street, about four or five blocks south-west from defendant's place of residence. The accident occurred at the intersection of Magnolia and Wilson avenues at a point about one mile north-west from defendant's home. The undisputed evidence shows that plaintiff's home is situated at a point between the garage and the place where the accident happened. Under defendant's contract with the garage owner the latter was to store defendant's car when not in use and through an employe to deliver it to defendant at his residence and to call for it to be taken to the garage when required. On the day of the accident Joseph

admitted that defendant was not operating the car himself at the time of the accident. It is asserted, however, that the accident occurred a short time after defendant had been using his car for the pleasure of himself and his family; that in accordance with his usual custom defendant had turned his car over to his agent, Joseph Libal, Jr., to take it back to the garage where it was kept. The undisputed evidence shows that defendant's car was not being operated by him or by any person authorized by him to operate it at the time and place where the accident occurred. The only evidence introduced by the plaintiff which tends to show defendant's ownership of the car or his participation in the accident is that of the plaintiff who said that one of the occupants of the car which collided with his gave the witness the name of William R. Coats. L. C. Read, the only other occurrence witness, testified that Mr. Coats, the defendant, was not in the car or present at the time the accident occurred. On this showing the court at the close of plaintiff's case should have instructed the jury to return a verdict for the defendant.

The uncontradicted evidence on behalf of the defendant is to the effect that he lives at 631 Hamilton Road, Chicago, and that he kept his automobile at a garage at 3635 N. Halsted street, about four or five blocks south-west from defendant's place of residence. The accident occurred at the intersection of Magnolia and Wilson avenues at a point about one mile north-west from defendant's home. The undisputed evidence shows that plaintiff's home is situated at a point between the garage and the place where the accident happened. Under defendant's contract with the garage owner the latter was to store defendant's car when not in use and through an employe to deliver it to defendant at his residence and to call for it to be taken to the garage when required. On the day of the accident Joseph

Libal, Jr., son of the owner of the garage called for the car in the evening to take it back to the garage in accordance with a usual custom. Instead of doing so, however, he drove a distance of a mile to a mile and one-half northwest of defendant's home and stopped at a garage to visit a schoolmate where he remained for about an hour. After this visit he drove west on Wilson avenue where he picked up his mother and father. He then proceeded one block west on Wilson avenue and was about to turn south on Magnolia avenue when the accident happened.

The evidence shows without any question whatsoever that Joseph Libal, Jr., without the authority or knowledge of the defendant drove the latter's car for a purpose in no way connected with the defendant's business. The accident did not occur while the driver was operating the car on the route back to the garage. On this record it was the duty of the court at the close of defendant's evidence to instruct the jury to find the defendant not guilty. Joseph Libal's, Jr., possession of the car was solely for the purpose of returning it to the garage and it became his duty in doing so to adopt the usual route thereto.

The relation of master and servant did not exist between Joseph Libal, Jr., and defendant at the time the accident occurred and the car was not being operated by the former in any business or work even remotely connected with defendant's business. The defendant had no control over the driver of the car at the time the accident occurred, nor did he direct him in any manner to use or operate the car except as stated to return it directly to the garage. It will not be necessary here to decide the point urged that the defendant was a bailor of the car at the time the accident occurred and that he would not be liable for an accident occurring while the car was in the possession of the servant of the garage owner, a bailee.

Libal, Jr., son of the owner of the garage called for the car in the evening to take it back to the garage in accordance with a usual custom. Instead of doing so, however, he drove a distance of a mile to a mile and one-half northwest of defendant's home and stopped at a garage to visit a schoolmate where he remained for about an hour. After this visit he drove west on Wilson avenue where he picked up his mother and father. He then proceeded one block west on Wilson avenue and was about to turn south on Kenmore avenue when the accident happened.

The evidence shows without any question whatsoever that Joseph Libal, Jr., without the authority or knowledge of the defendant drove the father's car for a purpose in no way connected with the defendant's business. The accident did not occur while the driver was operating the car on the route back to the garage. On this record it was the duty of the court at the close of defendant's evidence to instruct the jury to find the defendant not guilty. Joseph Libal's, Jr., possession of the car was solely for the purpose of returning it to the garage and it became his duty in doing so to adopt the usual route thereto.

The relation of master and servant did not exist between Joseph Libal, Jr., and defendant at the time the accident occurred and the car was not being operated by the former in any business or work even remotely connected with defendant's business. The defendant had no control over the driver of the car at the time the accident occurred, nor did he direct him in any manner to use or operate the car except as stated to return it directly to the garage. It will not be necessary here to decide the point urged that the defendant was a bailor of the car at the time the accident occurred and that he would not be liable for an accident occurring while the car was in the possession of the servant of the garage owner, a bailee.

As it is our opinion that even if it be held that the contract between the garage owner and the defendant did not constitute a bailment and that the driver of the car was in a sense the servant of defendant, the latter would not be liable where it appears as it does by this record that the alleged servant was at the time the accident occurred operating the car upon a mission in no way connected with the defendant or his business. Woods v. Bowman, 200 Ill. App. 612; Graham v. Page, 220 Ill. App. 431; Arkin v. Page, 287 Ill. 420.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Matchett, J., concur.

As it is our opinion that even if it be held that the contract between the garage owner and the defendant did not constitute a bailment and that the driver of the car was in a sense the servant of defendant, the latter would not be liable where it appears as it does by this record that the alleged servant was at the time the accident occurred operating the car upon a mission in no way connected with the defendant or his business. Moody v. Bowman, 200 Ill. App. 618; Graham v. Page, 220 Ill. App. 181; Atkin v. Page, 287 Ill. 420.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

McGuire, P. J., and Hatchett, J., concur.

424 - 27382

F. E. EDWARDS,
Appellee,

vs.

SOL H. GOLDBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On a trial in the Municipal Court of Chicago before the court without a jury a judgment was entered in favor of the plaintiff and against defendant for the sum of $850.44 which defendant seeks to reverse in this court.

The evidence introduced on the trial shows that the plaintiff, an engineer, was employed by the defendant to observe and report upon the result of a test which was made of a process for rebuilding old automobile tire cases known as the Savold Process.

There is no dispute between the parties as to the amount due the plaintiff for services which it is conceded were rendered by him. The defendant's position is that at the time he employed the plaintiff to make the test, he, defendant, was acting as the agent of the Savold Tire Corporation. This is the only question in the case. Plaintiff's testimony is to the effect that he was employed directly by Goldberg; that the latter did not inform him that he was acting for the Savold Company. Plaintiff's testimony is corroborated by a letter written by him to Goldberg on July 1, 1919. In this letter plaintiff stated that he was ready and willing to make the test upon terms indicated in the letter. The letter was addressed to Goldberg and no mention is made

424 - 27282

Y. E. EDWARDS,
Appellee,

vs.

SOL H. GOLDBERG,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On a trial in the Municipal Court of Chicago before the court without a jury a judgment was entered in favor of the plaintiff and against defendant for the sum of $850.44 which defendant seeks to reverse in this court.

The evidence introduced on the trial shows that the plaintiff, an engineer, was employed by the defendant to observe and report upon the result of a test which was made of a process for rebuilding old automobile tire cases known as the Savoid Process.

There is no dispute between the parties as to the amount due the plaintiff for services which it is conceded were rendered by him. The defendant's position is that at the time he employed the plaintiff to make the test, he, defendant, was acting as the agent of the Savoid Tire Corporation. This is the only question in the case. Plaintiff's testimony is to the effect that he was employed directly by Goldberg; that the latter did not inform him that he was acting for the Savoid Company. Plaintiff's testimony is corroborated by a letter written by him to Goldberg on July 1, 1919. In this letter plaintiff stated that he was ready and willing to make the test upon terms indicated in the letter. The letter was addressed to Goldberg and no mention is made

therein of the Savold Tire Corporation. The test was to be made upon tires placed upon a car which plaintiff first saw at the office of the Hump Hairpin Company, of which Goldberg was president. Goldberg testified that at the time the contract was entered into he informed plaintiff that the Savold Tire Corporation wanted to make the test. This testimony is denied by plaintiff, who states that at the time the arrangement was entered into with Goldberg, he, plaintiff, did not know anything about the Savold Tire Company and that Goldberg did not at any time tell him that certain payments which were made to plaintiff had been advanced by the company. The evidence shows that an advance payment of $250, demanded by plaintiff as a retainer was paid to him by Goldberg on July 3, 1919, and that the latter by his personal check on July 14, 1919, paid plaintiff $470 ahd again on July 23, 1919, by check of the Hump Hairpin Manufacturing Company he paid plaintiff the sum of $445.42.

There is some contradiction in the evidence as to just what was said by the parties to the contract at the time it was entered into. The only witnesses in the case were the plaintiff and defendant and in this state of the record we must of necessity rely upon the judgment of the trial judge who had an opportunity to hear and see the witnesses. The defendant admits that he employed plaintiff to perform the services in question. Plaintiff says in effect that he dealt with defendant as principal. Whether he did so or not was a question of fact which could best be determined by the trial judge. It is not enough to show that after the services had been substantially completed by plaintiff that he became aware of the fact that his work inured to the benefit of the Savold Tire Company. We think the evidence shows that Goldberg failed to disclose the fact that he was in any way acting for another. Indeed, Goldberg's own evidence is to the

thereto of the Davoid Tire Corporation. The test was to be made upon tires placed upon a car which plaintiff first saw at the office of the Dump Hairpin Company, of which Goldberg was president. Goldberg testified that at the time the contract was entered into he informed plaintiff that the Davoid Tire Corporation wanted to make the test. This testimony is denied by plaintiff, who states that at the time the arrangement was entered into with Goldberg, he, plaintiff, did not know anything about the Davoid Tire Company and that Goldberg did not at any time tell him that certain payments which were made to plaintiff had been advanced by the company. The evidence shows that an advance payment of $250, demanded by plaintiff as a retainer was paid to him by Goldberg on July 3, 1919, and that the latter by his personal check on July 14, 1919, paid plaintiff $470 and again on July 22, 1919, by check of the Dump Hairpin Manufacturing Company he paid plaintiff the sum of $415.42.

There is some contradiction in the evidence as to just what was said by the parties to the contract at the time it was entered into. The only witnesses in the case were the plaintiff and defendant and in this state of the record we must of necessity rely upon the judgment of the trial judge who had an opportunity to hear and see the witnesses. The defendant admits that he employed plaintiff to perform the services in question. Plaintiff says in effect that he dealt with defendant as principal. Whether he did so or not was a question of fact which could best be determined by the trial judge. It is not enough to show that after the services had been substantially completed by plaintiff that he became aware of the fact that his work inured to the benefit of the Davoid Tire Company. We think the evidence shows that Goldberg failed to disclose the fact that he was in any way acting for another. Indeed, Goldberg's own evidence is to the

effect that he was merely a stockholder of the Savold Company and when questioned as to whether he was an officer of the latter he answered "I had no connection with them whatever."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

effect that he was merely a stockholder of the David Company and when questioned as to whether he was an officer of the latter he answered "I had no connection with them whatever."

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McCurdy, P. J., and Hatchett, J., concur.

453 - 27411

2694

CHARLES DUBAL,
Appellant,

vs.

AMELIA APPLEBY,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 602

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles Dubal, brought an action in assumpsit in the Circuit Court of Cook County against defendant, Amelia Appleby, his sister, to recover the sum of $4,896.50, which plaintiff alleged in a bill of particulars filed in the cause was loaned by him to defendant "for a short time." A judgment was entered in the cause on a verdict of a jury in favor of the defendant, and plaintiff brings the case by appeal to this court.

The principal question of fact in dispute between the parties is as to whether the amount sued for constituted a loan from plaintiff to defendant, or whether, as asserted by defendant, the sum represented a balance due her out of $10,000 which she asserts was delivered to plaintiff in October, 1916, and for which plaintiff delivered to her a receipt. There is an almost irreconcilable conflict in the evidence. The abstract of record only partially discloses the evidence introduced on the trial and we have been compelled, within the time at our disposal, to obtain material facts of the case as they appear in the record.

The evidence shows that on June 5, 1917, the plaintiff paid to defendant by cashier's check the amount sued for. The evidence does not show that defendant promised to repay this sum to him, or that she had agreed to deliver a promissory note therefor, as stated in the bill of particulars. There is evidence to the effect that for some years prior to October, 1916, ill-feeling of some sort existed between the parties to the suit.

CHARLES NUNN,
Appellant,

vs.

AMELIA APPLEBY,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE DUFFY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Charles Nunn, brought an action in assumpsit in the Circuit Court of Cook County against defendant, Amelia Appleby, his sister, to recover the sum of $4,096.80, which plaintiff alleged in a bill of particulars filed in the cause was loaned by him to defendant "for a short time." A judgment was entered in the cause on a verdict of a jury in favor of the defendant, and plaintiff brings the case by appeal to this court.

The principal question of fact in dispute between the parties is as to whether the amount sued for constituted a loan from plaintiff to defendant, or whether, as asserted by defendant, the sum represented a balance due her out of $10,000 which she asserts was delivered to plaintiff in October, 1916, and for which plaintiff delivered to her a receipt. There is an almost irreconcilable conflict in the evidence. The abstract of record only partially discloses the evidence introduced on the trial and we have been compelled, within the time at our disposal, to obtain material facts of the case as they appear in the record.

The evidence shows that on June 5, 1917, the plaintiff paid to defendant by cashier's check the amount sued for. The evidence does not show that defendant promised to repay this sum to him, or that she had agreed to deliver a promissory note therefor, as stated in the bill of particulars. There is evidence to the effect that for some years prior to October, 1916, the relations of some sort existed between the parties in the suit,

A receipt was introduced in evidence which, if genuine, shows that plaintiff received from defendant the sum of $10,000. Plaintiff denied that he received this sum or that the signature to the receipt was his. Upon this question of fact the jury had sufficient evidence to support its finding against plaintiff. Other signatures, which we think the evidence shows were the genuine signatures of plaintiff, were introduced in evidence and the jury by comparison of these with the disputed signatures were authorized to conclude that plaintiff's denial of his signature to the receipt was untrue. The evidence shows that at or about the time of the $10,000 transaction defendant's husband was seriously ill and that she was compelled to take him to California, where they remained until about June 1, 1917. Defendant's husband during this time was the owner of a large amount of property, part of which consisted of a flat building in the City of Chicago, and defendant's position, which is supported by the evidence in the case, is that she gave the management of this property to plaintiff, her brother, pending the absence of herself and husband; that she also turned over the $10,000 to him with directions to use it in the management and care of the property; that on her return from California to Chicago there was left in a bank in plaintiff's name the sum of $4,896.50, the exact amount sued for in this suit, and that he, plaintiff, voluntarily paid this sum over to her as an undisposed of balance out of the $10,000 delivered to him.

The conflict in the evidence involves so many other transactions between the parties that it will be impossible here to indicate only certain matters of fact which we think had an influence in procuring the verdict and judgment in favor of the defendant. For instance, in support of his contention that the amount sued for was his own private fund, the plaintiff sought to

A receipt was introduced in evidence which, if genuine, shows that plaintiff received from defendant the sum of $10,000. Plaintiff denied that he received this sum or that the signature to the receipt was his. Upon this question of fact the jury had sufficient evidence to support its finding against plaintiff. Other signatures, which we think the evidence shows were the genuine signatures of plaintiff, were introduced in evidence and the jury by comparison of these with the disputed signatures were authorized to conclude that plaintiff's denial of his signature to the receipt was untrue. The evidence shows that at or about the time of the $10,000 transaction defendant's husband was serious ill and that she was compelled to take him to California, where they remained until about June 1, 1917. Defendant's husband during this time was the owner of a large amount of property, part of which consisted of a flat building in the City of Chicago, and defendant's position, which is supported by the evidence in the case, is that she gave the management of his property to plaintiff, her brother, pending the absence of herself and husband; that she also turned over the $10,000 to him with directions to use it in the management and care of the property; that on her return from California to Chicago there was left in a bank in plaintiff's name the sum of $4,088.50, the exact amount sued for in this suit, and that he, plaintiff, voluntarily paid this sum over to her as an indirect of balance out of the $10,000 delivered to him.

The conflict in the evidence involves no study other transactions between the parties that it will be reasonable here to indicate only certain matters of fact which we think had an influence in producing the verdict and judgment in favor of the defendant. For instance, in support of his contention that the amount sued for was his own private fund, the plaintiff sought to

prove that he had saved from his wages as a plumber from $500 to $600 a year, and that he had received for overtime work $10 to $15 a week above the union scale. This evidence was introduced by him in support of his contention that he had saved a considerable sum of money, out of which the sum sued for and other amounts had been loaned by him to defendant. Notwithstanding this, he filed an answer in a divorce suit to which he was a party, in which he denied that he had received as wages as a plumber as much as $35 a week, and he stated in his answer that he had been out of work for two months during 1917, and that on August 4, 1917, he was employed as a machinist at $20 a week. The receipt for the $10,000 is as follows:

> "Received of Amelia Appleby, $10,000.00 to be paid to her when she calls for it, only as a loan to be placed on my bank account (Signed) Charles Dubal."

We think the preponderance of the evidence shows that plaintiff did sign this receipt, and defendant asserts that on her return to Chicago about June 1, 1917, she and plaintiff checked up their accounts, at which time she discovered that plaintiff had spent all of the $10,000 delivered to him except the balance of $4,896.50, which was then on deposit in the bank. The evidence does disclose that a certificate of deposit of the National City Bank of Chicago for $10,000 was executed in favor of John F. Appleby, defendant's husband, and that he had endorsed and delivered it to defendant. She asserts that she cashed this certificate and delivered the money to plaintiff, who admits that he was in charge of the large real estate interests of the Applebys while they were in California. The evidence further tends to prove that the plaintiff never kept a bank account at any time until October 1, 1916, the time, it is alleged, when he received the $10,000. To say the least, plaintiff's testimony is not impressive, and while we have not attempted to indicate all the

prove that he had saved from his wages as a plumber from $500 to $600 a year, and that he had received for overtime work $10 to $18 a week above the union scale. This evidence was introduced by him in support of his contention that he had saved a considerable sum of money, out of which the sum sued for and other amounts had been loaned by him to defendant. Notwithstanding this, he filed an answer in a divorce suit to which he was a party, in which he denied that he had received as wages as a plumber as much as $50 a week, and he stated in his answer that he had been out of work for two months during 1917, and that on August 4, 1917, he was employed as a machinist at $30 a week. The receipt for the $10,000 is as follows:

> "Received of Amelia Applehy, $10,000.00 to be paid to her when she calls for it, only as a loan to be placed on my bank account. (Signed) Charles Ahlen."

We think the preponderance of the evidence shows that plaintiff did sign this receipt, and defendant asserts that on her return to Chicago about June 1, 1917, she and plaintiff checked up their accounts, at which time she discovered that plaintiff had spent all of the $10,000 delivered to him except the balance of $4,326.80, which was then on deposit in the bank. The evidence does disclose that a certificate of deposit of the National City Bank of Chicago for $10,000 was executed in favor of John F. Applehy, defendant's husband, and that he had endorsed and delivered it to defendant. The evidence shows that he cashed this certificate and delivered the money to plaintiff, who admits that he was in charge of the large real estate interests of the Applehys while they were in California. The evidence further tends to prove that the plaintiff never kept a bank account at any time until October 1, 1919, the time, it is alleged, when he received the $10,000. To say the least, plaintiff's testimony is not impressive, and while we have not attempted to indicate all the

evidence introduced on the trial, it is our opinion that the jury were well authorized in finding the issues of fact in favor of the defendant.

It is said that a certain transaction involving the execution of a chattel mortgage to plaintiff by defendant pledging certain personal property, was done for the purpose of preventing conservators appointed for the estate of defendant's husband from obtaining possession of the property. Whatever may be said of this transaction, we are unable to see how it has any important bearing upon the question involved in the present suit.

The first two of three given instructions tendered by the defendant informed the jury that if upon the whole case the jury were in doubt from the evidence as to whether defendant was indebted to him, or if the evidence introduced on this question was evenly balanced, or if the jury were unable to say on which side the evidence preponderated, the plaintiff could not recover. The first of these instructions was somewhat informal; the second given instruction states correct principles of law. An instruction given on behalf of the plaintiff, however, stated the law somewhat too favorably to the plaintiff. In this instruction the jury were informed that if they believed that the money sued for had been delivered by cashier's check to defendant, the jury were to return a verdict in plaintiff's favor, unless the jury found from the evidence that the money was the property of defendant and that the burden of establishing a title to the money was placed by law upon the defendant. It is our opinion that the burden of proof rested upon the plaintiff to prove not only that he had delivered the check to defendant, but that it constituted, as he claims, a loan to her which she, defendant, had not repaid. In any event, the questions raised in connection with the giving or refusing to give instructions are not properly presented to us.

evidence introduced on the trial, it is our opinion that the jury were well authorized in finding the issues of fact in favor of the defendant.

It is said that a certain transaction involving the execution of a chattel mortgage to plaintiff by defendant pledging certain personal property, was done for the purpose of preventing conservators appointed for the estate of defendant's husband from obtaining possession of the property. Whatever may be said of this transaction, we are unable to see how it has any important bearing upon the question involved in the present suit.

The first two of three given instructions tendered by the defendant informed the jury that if upon the whole case the jury were in doubt from the evidence as to whether defendant was indebted to him, or if the evidence introduced on this question was evenly balanced, or if the jury were unable to say on which side the evidence preponderated, the plaintiff could not recover. The first of these instructions was somewhat informal; the second given instruction states correct principles of law. An instruction given on behalf of the plaintiff, however, stated the law somewhat too favorably to the plaintiff. In this instruction the jury were informed that if they believed that the money sued for had been delivered by ensuing's order to defendant, the jury were to return a verdict in plaintiff's favor, unless the jury found from the evidence that the money was the property of defendant and that the burden of establishing a title to the money was placed by law upon the defendant. It is our opinion that the burden of proof rested upon the plaintiff to prove not only that he had delivered the check to defendant, but that it constituted, as he claims, a loan to her which she, defendant, had not repaid. In any event, the questions raised in connection with the giving or refusing to give instructions are not properly presented to us.

Neither the record nor the abstract of record filed in this court shows that such instructions as appear therein constitute all that were given or refused on the trial.

It is charged that counsel for defendant was guilty during the trial of making unfair and prejudicial statements in argument to the jury and during the course of the trial. This charge is met by the assertion that counsel for plaintiff used in the presence of the jury epithets and language quite as offensive as that indulged in by defendant's counsel; that counsel for both parties were guilty of improper conduct in the presence of the jury is certain, and had plaintiff's counsel been satisfied with making his objections to opposing counsel's conduct at the trial, this court would have been compelled to reverse the judgment notwithstanding our opinion that the evidence preponderates in defendant's favor. Eisel v. Kerens-Donnewald Coal Co., 159 Ill. App. 8. The words "vamp," "schemer" and "blackmailer" were bandied about between counsel. Counsel for plaintiff charged defendant and her counsel with being "a villianous pair of vamps;" that defendant's counsel was playing "the double game, and he is as guilty as she is, guilty of the meanest, cowardly conduct known to a lawyer and against all legal ethics and too low for any self-respecting member of the bar to even associate with or to try a case with on the other side of it." Other language of plaintiff's counsel tends to charge defendant, outside of the record, with the crime of forgery. While it is true that these charges and epithets were met by defendant's counsel with language quite as offensive as that employed by plaintiff's counsel, we do not think that on the record before us, and in view of the equally objectionable remarks made by plaintiff's attorney that the latter's error should cause a reversal of what appears to be a just

Neither the record nor the abstract of record filed in this court show that such instructions as appear therein constitute all that were given or refused on the trial.

It is charged that counsel for defendant was guilty during the trial of making unfair and prejudicial statements in argument to the jury and during the course of the trial. This charge is met by the assertion that counsel for plaintiff used in the presence of the jury epithets and language quite as offensive as that indulged in by defendant's counsel; that counsel for both parties were guilty of improper conduct in the presence of the jury in certain, and had plaintiff's counsel been satisfied with making his objections to opposing counsel's conduct at the trial, this court would have been compelled to reverse the judgment notwithstanding our opinion that the evidence preponderates in defendant's favor. Nikel v. Kansas-Nebraska Coal Co., 189 Ill. App. 8. The words "rag," "schemer" and "blackmailer" were bandied about between counsel. Counsel for plaintiff charged defendant and her counsel with being "a villainous pair of vampa;" that defendant's counsel was playing "the double game, and he is as guilty as she is, guilty of the meanest, cowardly conduct known to a lawyer and against all legal ethics and too low for any self-respecting member of the bar to even associate with or to try a case with on the other side of it." Other language of plaintiff's counsel tends to charge defendant, outside of the record, with the crime of forgery. While it is true that these charges and epithets were met by defendant's counsel with language quite as offensive as that employed by plaintiff's counsel, we do not think that on the record before us, and in view of the equally objectionable remarks made by plaintiff's attorney that the latter's error should cause a reversal of what appears to be a just

verdict and judgment. Kenna v. Calumet H. & S. R. Co., 206 Ill. App. 17; Peyton v. Village of Morgan Park, 172 Ill., 102.

The judgment of the Circuit court is affirmed.

AFFIRMED.

McSurely, P. J, and Matchett, J., concur.

verdict and judgment. Kenna v. Gilmer R. & R. R. Co., 208 Ill. App. 17; Peyton v. Village of Morgan Park, 178 Ill., 102.

The judgment of the circuit court is affirmed.

AFFIRMED.

Mulkey, P. J., and Matchett, J., concur.

468 - 27426

WILLIAM HAGLEY, Appellee, vs. CHICAGO WET WASH COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal Court of Chicago to recover damages alleged to have been sustained by him by reason of a collision which occurred on December 13, 1919, between automobiles owned respectively by plaintiff and defendant. A judgment was entered upon the verdict of a jury in favor of the plaintiff for the sum of $338.20. Defendant brings the case here by appeal for review.

The principal reason urged here for a reversal of the judgment is that the court erred in admitting improper evidence on the trial. To prove the damages which plaintiff asserted he was entitled to, he sought to prove that his automobile as a result of the collision was injured to such extent that he was compelled to pay the sum of $281 in repairing it.

The driver of plaintiff's car testified that as a result of the accident the whole rear end of the car, an Overland Roadster, was torn out and "also the running board and the fender;" that both rear wheels were broken, one tire cut and the windshield smashed.

One Abrahams, testifying for the plaintiff, stated that he was manager of the White Garage where plaintiff's machine was repaired after the accident; that he, the witness,

WILLIAM HADLEY,
Appellee,

vs.

CHICAGO WEST WASH COMPANY,
a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DRAWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action in the Municipal Court of Chicago to recover damages alleged to have been sustained by him by reason of a collision which occurred on December 15, 1919, between automobiles owned respectively by plaintiff and defendant. A judgment was entered upon the verdict of a jury in favor of the plaintiff for the sum of $250.20. Defendant brings the case here by appeal for review.

The principal reason urged here for a reversal of the judgment is that the court erred in admitting improper evidence on the trial. To prove the damages which plaintiff asserted he was entitled to, he sought to prove that his automobile as a result of the collision was injured to such extent that he was compelled to pay the sum of $[illegible] in repairing it.

The driver of plaintiff's car testified that as a result of the accident the whole rear end of the car, an Overland Roadster, was torn out and "also the running board and the fender;" that both rear wheels were broken, one tire cut and the windshield smashed.

One Abrahams, testifying for the plaintiff, stated that he was manager of the White Garage where plaintiff's machine was repaired after the accident; that he, the witness,

saw the repairs made and that he had rendered a bill to plaintiff therefor. The witness further testified that he was unable to state specifically what repairs had been made on the car without referring to this bill. He testified that the charges made were the fair and reasonable charges for similar work, labor, parts and material in the City of Chicago at the time the work was done. We think the court was right in permitting the witness to testify as to what work was done on the car by reference to the bill which he had rendered for the services performed. The court also admitted the bill in evidence, and it is asserted that this ruling was error. As we read the evidence as it appears in the abstract of record, it is apparent that the witness was unable to testify as to the work done or as to the parts furnished without refreshing his recollection by reference to the bill which he had made and which was rendered for the work done for and material furnished to the plaintiff. Clearly it was not error to permit the witness to refresh his recollection by referring to this bill. The work on the car was done under the witness' direction.

In the case of Diamond Glue Company v. Wietzychowski, 227 Ill. 347, the Supreme Court held that a writing may be used for the purpose of refreshing the memory of a witness even where it appears after inspection of the writing that he has no independent recollection of the facts stated therein where the witness is able to state that he correctly reduced the facts appearing in the instrument to writing at the time of the occurrence, or within such a time afterwards that he then had a perfect recollection of them. In the case of Richardson Fueling Co. v. Seymour, 235 Ill. 323, a witness testified that he had no independent recollection of the amount of coal delivered to a vessel"outside of what is stated in the books,

saw the repairs made and that he had rendered a bill to plaintiff therefor. The witness further testified that he was unable to state specifically what repairs had been made on the car without referring to this bill. He testified that the charges made were the fair and reasonable charges for similar work, labor, parts and material in the City of Chicago at the time the work was done. We think the court was right in permitting the witness to testify as to what work was done on the car by reference to the bill which he had rendered for the services performed. The court also admitted the bill in evidence, and it is asserted that this ruling was error. As we read the evidence as it appears in the abstract of record, it is apparent that the witness was unable to testify as to the work done or as to the parts furnished without refreshing his recollection by reference to the bill which he had made and which was rendered for the work done for and material furnished to the plaintiff. Clearly it was not error to permit the witness to refresh his recollection by referring to this bill. The work on the car was done under the witness' direction.

In the case of Diamond Glue Company v. Bistrzycowski, 227 Ill. 347, the Supreme Court held that a writing may be used for the purpose of refreshing the memory of a witness even where it appears after inspection of the writing that he has no independent recollection of the facts stated therein short the witness is able to state that he correctly recorded the facts appearing in the instrument to writing at the time of the occurrence, or within such a time afterwards that he then had a perfect recollection of them. In the case of Richardson Heating Co. v. Kuykendall, 238 Ill. 323, a witness testified that he had no independent recollection of the amount of coal delivered to a vessel "outside of what is stated in the books,

but he knew he put it down there at the time and that it was true. The Supreme Court said that "The delivery tickets or receipts it was admitted, had been turned over to counsel for defendants and were lost. The witness was then permitted to read from the book the enteries showing the dates and the amounts of the deliveries. In this we think there was no error." In the present case we have an instrument admitted in evidence made by the witness himself. We do not think it was error under the facts shown to admit the bill in evidence.

It constituted error to permit Abrahams to testify that the "repair was caused by the collision." It is not argued, however, in the brief of counsel that the defendant was not guilty of the negligence charged and that it was not legally liable for the damages resulting to plaintiff from the accident. There is no dispute in the evidence as to the injuries done plaintiff's car and while the court erred in permitting the witness to make the statement referred to, we do not think this error was sufficiently serious to warrant a reversal of the judgment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

but he knew he put it down there at the time and that it was true. The Supreme Court said that "The delivery tickets or receipts it was admitted, had been turned over to counsel for defendants and were lost. The witness was then permitted to read from the book the entries showing the dates and the amounts of the deliveries. In this we think there was no error." In the present case we have an instrument admitted in evidence made by the witness himself. We do not think it was error under the facts shown to admit the bill in evidence.

It constituted error to permit Abraham to testify that the "repair was caused by the collision." It is not argued, however, in the brief of counsel that the defendant was not guilty of the negligence charged and that it was not legally liable for the damages resulting to plaintiff from the accident. There is no dispute in the evidence as to the injuries done plaintiff's car and while the court erred in permitting the witness to make the statement referred to, we do not think this error was sufficiently serious to warrant a reversal of the judgment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

447 - 27405

RALPH R. BRADLEY et al.,
Doing Business as Goodrich,
Vincent & Bradley,
Appellees,

vs.

W.McMILLAN AND SON, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I A. 095

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case is now pending on a rehearing which has been granted.

The plaintiffs sued for money expended at defendant's request, amounting to $35.10, and for the further sum of $1,000 claimed to be due to them from the defendant for attorney's fees. Liability for the money expended was admitted, but as to the claim for legal services defendant denied that it had employed plaintiffs. It also averred that it had no knowledge whether the amount claimed for attorney's fees was reasonable. The cause was tried by a jury, and the court instructed that it was necessary to a recovery for plaintiffs to prove by a preponderance of the evidence, the fact of their employment by defendant and the rendition of the services by them. The jury were further instructed that if these facts were established by a preponderance of the evidence, then the jury should find the issues for the plaintiffs, and assess the damages at the sum of $1,000 for the services performed, and the further sum of $35.10 for the money advanced.

The only assignment argued which we have regarded as worthy of consideration is that the court erred in directing the jury, in case of a finding for the plaintiffs, to allow $1,000 for the legal services performed. It is to be noted that the statement of claim does not allege that the sum charged for the services is reasonable. However, evidence was received without objection on that

RALPH R. BRADLEY et al.,
Doing Business as Coordinate,
Vincent & Bradley,
Appellees,

vs.

T. MORRISON AND SON, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MACHRAY DELIVERED THE OPINION OF THE COURT.

This case is now pending on a rehearing which has been granted.

The plaintiffs sued for money expended at defendant's request, amounting to $38.10, and for the further sum of $1,000 claimed to be due to them from the defendant for attorney's fees. Liability for the money expended was admitted, but as to the claim for legal services defendant denied that it had employed plaintiffs. It also averred that it had no knowledge whether the amount claimed for attorney's fees was reasonable. The cause was tried by a jury, and the court instructed that it was necessary to a recovery for plaintiffs to prove by a preponderance of the evidence, the fact of their employment by defendant and the rendition of the services by them. The jury were further instructed that if these facts were established by a preponderance of the evidence, then the jury should find the issues for the plaintiffs, and assess the damages at the sum of $1,000 for the services performed, and the further sum of $38.10 for the money advanced.

The only assignment which we have considered as worthy of consideration is that the court erred in directing the jury, in case of a finding for the plaintiffs, to allow [illegible] for the legal services performed. It is to be noted that [illegible] statement of claim does not allege that the sum charged is [illegible] reasonable. However, evidence was received without objection on that

subject, and there is uncontradicted evidence tending to show that the sum charged was not only a reasonable amount, but less than the usual charges at that time and place for such services.

We stated in the former opinion that as there was evidence from which the jury might conclude that the damages were unliquidated, the court should not have named a specific amount to be allowed for services rendered in case the jury found for plaintiffs on the other issues.

In their petition for a rehearing the plaintiffs strenuously argue that this court misunderstood the record, but after a consideration of the arguments pro and con we are still of the opinion that it was technically an error on the record for the court to name an express amount as due for the legal services, in case defendant was liable. We are, however, further of the opinion that while technically an error, it is not one which would justify us in reversing the judgment. The services rendered concerned a very important matter, namely, the reorganization of a corporation, and the issuing of bonds secured by its assets, which bonds, it was expected, would be sold to the public.

In view of the importance of the services, the complications which it was necessary to meet, etc., as well as the time and attention given to the same, should a jury find for a lesser amount and judgment be entered therefor, this court, upon appeal or writ of error by plaintiffs, would be obliged to reverse for the reason that the verdict would be against the preponderance of the evidence.

The question before us, therefore, is whether, for a mere technical error, we ought to reverse and remand for another trial, where a different result, if obtained, by the defendant, would not be allowed to stand. Since we are of that opinion,

subject, and there is uncontradicted evidence tending to show that the sum charged was not only a reasonable amount, but less than the usual charges at that time and place for such services.

We stated in the former opinion that as there was evidence from which the jury might conclude that the damages were unliquidated, the court should not have named a specific amount to be allowed for services rendered in case the jury found for plaintiffs on the other issues.

In their petition for a rehearing the plaintiffs strenuously argue that this court misunderstood the record, but after a consideration of the arguments pro and con we are still of the opinion that if we technically an error on the record for the court to name as express amount as due for the legal services, in case defendant was liable. We are, however, further of the opinion that while technically an error, it is not one which would justify us in reversing the judgment. The services rendered concerned a very important matter, namely, the reorganization of a corporation, and the handling of bonds secured by its assets, which bonds, it was expected, would be sold to the public.

In view of the importance of the services, the complications which it was necessary to meet, etc., as well as the time and attention given to the case, should a jury find for a larger amount and judgment be entered therefor, this court, upon appeal or writ of error by plaintiffs, would be obliged to reverse for the reason that the verdict would be against the preponderance of the evidence.

The question before us, therefore, is whether, for a mere technical error, we ought to reverse and remand for another trial, where a different result, if obtained, by the defendant, would not be allowed to stand. Since we are of that opinion,

hardly seems fair to either party to send the case back for a new trial. For this reason we affirm the judgment.

AFFIRMED.

McSurely, P. J., and Dever, J, concur.

Hardly seems fair to either party to send the case back for a new trial. For this reason we affirm the judgment.

AFFIRMED.

McNaughton, P. J., and Dever, J., concur.

480 - 27438

MAE BURR et al.,
Appellees,

vs.

OLGA V. ROSSLER et al.
On Appeal of Olga V. Rossler,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

227 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in chancery. The case was heard upon the issues as made up by an amended and supplemental bill filed July 21, 1920, the answer of the defendant thereto, which answer defendant asked might be taken as a cross-bill, and the answer of complainant under oath to this cross-bill.

The supplemental bill alleged in substance that the defendant, Mrs. Rossler, also known as Mrs. Dooley, was the owner of certain premises; that on or about October 15, 1918, complainant loaned to her the sum of $2800, upon the express promise that defendant would make certain notes therefor and execute a trust deed conveying the premises in question as security for the indebtedness; that $34 of the loan was immediately repaid; that thereafter defendant Rossler made in her own handwriting and delivered to complainant 83 principal notes, numbered 1 to 82 respectively; that the note numbered 1 was dated October 15, 1918, and the other notes of the series, numbered consecutively thereafter, were dated the 15th day of each month succeeding October 15, 1918, and that the notes matured monthly upon the dates which they respectively bore; that defendant Rossler executed and delivered a trust deed conveying to the complainant N. LaDoit Johnson the premises in question, to secure the payment of the indebtedness; that the trust deed was not acknowledged, and after its delivery was mislaid and lost; that the abstract of title was delivered to complainant Mae Burr; that notes numbered 1 to 9

480 - 27433

MAX HURR et al.,
Appellees,

vs.

OLGA V. HOESLER et al.
On Appeal of Olga V. Hoesler,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

22714.003

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in chancery. The case was heard upon the issues as made up by an amended and supplemental bill filed July 21, 1930, the answer of the defendant thereto, which answer defendant asked might be taken as a cross-bill, and the answer of complainant under oath to this cross-bill.

The supplemental bill alleged in substance that the defendant, Mrs. Hoesler, also known as Mrs. Dooley, was the owner of certain premises; that on or about October 15, 1918, complainant loaned to her the sum of $2800, upon the express promise that defendant would make certain notes therefor and execute a trust deed conveying the premises in question as security for the indebtedness; that $54 of the loan was immediately repaid; that thereafter defendant Hoesler made in her own handwriting and delivered to complainant 32 principal notes, numbered 1 to 32 respectively; that the note numbered 1 was dated October 15, 1918, and the other notes of the series, numbered consecutively thereafter, were dated the 15th day of each month succeeding October 15, 1918, and that the notes matured monthly upon the dates which they respectively bore; that defendant Hoesler executed and delivered a trust deed conveying to the complainant W. Scott Johnson the premises in question, to secure the payment of the indebtedness; that the trust deed was not acknowledged, and after its delivery was mislaid and lost; that the abstract of title was delivered to complainant Max Hurr; that notes numbered 1 to 9

inclusive, representing $300 of the amount of the indebtedness, were paid and that default had been made in payment of the other notes and performance of the covenants of the trust deed. A trust deed alleged to be substantially in the form of the lost one was attached to the bill.

The bill also set up alleged facts by reason of which, it was claimed, Mrs. Burr was subrogated to the rights of the holder of a prior trust deed, and it prayed for the restoration of the lost trust deed, the foreclosure of it, subrogation, and general relief.

The answer and cross-bill denied the execution of the trust deed and the promise to execute it, but said that the defendant did borrow from the complainant October 15, 1918, $2,500, and thereafter gave therefor 75 of the notes mentioned; that the other 8 notes were given for the purchase price of a barrel of alcohol, amounting to $266, which complainant promised to deliver to defendant for use in a perfumery establishment in which the defendant, Mrs. Rossler, was a partner, but which alcohol the complainant never delivered; further, that as security for the payment of these notes, she turned over to Mrs. Burr diamonds of the value of $6,500.

The answer and cross-bill denies that the defendant Rossler ever delivered the abstract of title to Mrs. Burr, but says that Mrs. Burr secured access to Mrs. Rossler's apartment and took the abstract, for the purpose of lending color to her claims.

The answer further alleges that Mrs. Rossler has paid 9 notes, and that on July 15, 1919, she tendered to Mrs. Burr the amount due on note number 10, but that the tender was refused.

The answer denies other material averments of the bill and prays that Mrs. Burr may be decreed to hold the jewelry

inclusive, representing $500 of the amount of the indebtedness, were paid and that default had been made in payment of the other notes and performance of the covenants of the trust deed. A trust deed alleged to be substantially in the form of the last one was attached to the bill.

The bill also set up alleged facts by reason of which, it was claimed, Mrs. Burr was subrogated to the rights of the holder of a prior trust deed, and it prayed for the restoration of the last trust deed, the foreclosure of it, subrogation, and general relief.

The answer and cross-bill denied the execution of the trust deed and the promise to execute it, but said that the defendant did borrow from the complainant October 15, 1911, $2,500, and thereafter gave therefor 28 of the notes mentioned; that the other 8 notes were given for the purchase price of a barrel of alcohol, amounting to $266, which complainant promised to deliver to defendant for use in a pecuniary establishment in which the defendant, Mrs. Rosaler, was a partner, but which nor-hol the complainant never delivered; further, that as security for the payment of these notes, she turned over to Mrs. Burr diamonds of the value of $5,500.

The answer and cross-bill denies that the defendant Rosaler ever delivered the abstract of title to Mrs. Burr, but says that Mrs. Burr received losses to Mr. Rosaler's account and took the abstract, for the purpose of [illegible] to her claims.

The answer further alleges that Mrs. Rosaler has paid 9 notes, and that on July 14, 1910, she transferred to Mrs. Burr the amount due on note number 15, but that the transfer was refused.

The answer denies other material averments of the bill and prays that Mrs. Burr may be decreed to [illegible] the jewelry

as security for the loan, and that the notes for $266, representing the purchase price of the alcohol mentioned, may be surrendered and cancelled.

The verified answer of the complainants to the cross-bill denied its material averments, including the alleged sale of the alcohol, the alleged receipt of the diamonds as security, and the tender of payment on note number 10.

The decree, after finding the facts substantially as set forth in the supplemental bill and answer to the cross-bill, ordered that the cross-bill be dismissed for want of equity and finds that while Mrs. Burr had established her right to subrogation, she had waived the same; that there is due and owing to complainant the sum of $2,466, with interest at 6 per cent. from June 15, 1919, making a total amount of $2,715.06, for which complainant Mae Burr has a valid lien. The decree further ordered that in default of payment the premises should be offered for sale by a master, and that if the bid was not in excess of $1,000 (the amount of defendant's homestead) the same should not be sold, but if it was in excess of that amount a sale should be made, and Mrs. Rossler paid $1,000 for her homestead out of the proceeds.

In her statement of the case appellant Rossler specifies 36 respects in which it is claimed the court erred. Some of these refer to the alleged hostile attitude of the court. It is claimed that the chancellor at times took the examination of the witnesses into his own hands, and we are cited to a number of cases where this practice has been condemned, which cases, however, were suits at law tried before juries. That the rule does not obtain in chancery, where the chancellor tries both the facts and the law, is, we think, apparent. Moreover, it does not appear that the chancellor in this case prevented the attorneys upon either side from making full and complete inquiry as to the issues.

as security for the loan, and that the notes for $266, representing the purchase price of the alcohol mentioned, may be surrendered and cancelled.

The verified answer of the complainants to the cross-bill denied its material averments, including the alleged sale of the alcohol, the alleged receipt of the diamonds as security, and the tender of payment on note number 10.

The decree, after finding the facts substantially as set forth in the supplemental bill and answer to the cross-bill, ordered that the cross-bill be dismissed for want of equity and finds that while Mrs. Burr had established her right to subrogation, she had waived the same; that there is due and owing to complainant the sum of $2,466, with interest at 6 per cent. from June 15, 1919, making a total amount of $2,715.06, for which complainant Mae Burr has a valid lien. The decree further ordered that in default of payment the premises should be offered for sale by a master, and that if the bid was not in excess of $1,000 (the amount of defendant's homestead) the same should not be sold, but if it was in excess of that amount a sale should be made, and Mrs. Hoesler paid $1,000 for her homestead out of the proceeds.

In her statement of the case appellant Hoesler specifies 36 respects in which it is claimed the court erred. Some of these refer to the alleged hostile attitude of the court. It is claimed that the chancellor at times took the examination of the witnesses into his own hands, and we are cited to a number of cases where this practice has been condemned, which cases, however, were suits at law tried before juries. That the rule does not obtain in chancery, where the chancellor tries both the facts and the law, is, we think, apparent. Moreover, it does not appear that the chancellor in this case prevented the attorneys upon either side from making full and complete inquiry as to the issues.

Appellant also urges that incompetent evidence was admitted over appellant's objection, and this is probably true; but since the issues were tried without a jury, the chancellor will be presumed to have discredited such evidence, provided there is other competent evidence on which the finding might be based. Goelz v. Goelz, 157 Ill. 33; Richardson v. Eveland, 126 Ill., 37.

Complaint is also made that the court refused to permit questions to the trustee, Johnson, as to alleged conversations with him, out of the presence of the complainant Mae Burr. He was asked, "Did Mrs. Dooley say to you in the presence of this lady, 'If I get my papers back and jewelry I would settle?'" Objection was sustained to this question and, we think, properly, for the reason that it was not shown that the trustee, Johnson, was representing Mrs. Burr or had any right to speak for her at that time. We also think the chancellor properly struck out the statement of a witness for defendant, who testified that Dr. Johnson said he could do nothing with Mrs. Burr, as she was "absolutely jewelry crazy." This alleged statement was not said to have been made in the presence of Mrs. Burr, nor was it made to appear that Johnson was acting for her.

It is also contended by appellant that the evidence fails to show - as the decree finds - that note number 10 of the series was, in fact, due at the time of filing the suit; but we think there is no merit in this contention, as no time for payment is expressed in any of the notes. The statute provides that such instruments are payable on demand, and such is the general rule. See section 7, chap. 98, Cahill's Ill. Stats., 1921, p. 2382; Carnall v. Duval, 22 Ark. 137; Kabebian v. Shinkle, 26 R. I. 505, p. 508; Jones on Mortgages, vol. 2, sec.

Appellant also urges that incompetent evidence was admitted over appellant's objection, and this is probably true; but since the issues were tried without a jury, the chancellor will be presumed to have discredited such evidence, provided there is other competent evidence on which the finding might be based. Doels v. Doels, 187 Ill. 33; Richardson v. Hyslop, 126 Ill., 37.

Complaint is also made that the court refused to permit questions to the trustee, Johnson, as to alleged conversations with him, out of the presence of the complainant Mrs Burr. He was asked, "Did Mrs. Dooley say to you in the presence of this lady, 'If I get my papers back and jewelry I would settle?'" Objection was sustained to this question and, we think, properly, for the reason that it was not shown that the trustee, Johnson, was representing Mrs. Burr or had any right to speak for her at that time. We also think the chancellor properly struck out the statement of a witness for defendant, who testified that Dr. Johnson said he could do nothing with Mrs. Burr, as she was "absolutely jewelry crazy." This alleged statement was not said to have been made in the presence of Mrs. Burr, nor was it made to appear that Johnson was acting for her.

It is also contended by appellant that the evidence fails to show - as the decree finds - that note number 10 of the series was, in fact, due at the time of filing the suit; but we think there is no merit in this contention, as no claim for payment is expressed in any of the notes. The statute provides that such instruments are payable on demand, and so is the general rule. See section 7, chap. 98, Smith's Ill. Stats., 1921, p. 2382; Garrett v. Duval, 22 Ark. 137; Kelleher v. Guthrie, 26 R. I. 308, p. 308; Jones on Mortgages, vol. 2, sec.

1174; Eaton v. Truesdale, 40 Mich. 1, p. 6; Jackson v. Grosser, 218 Ill. 494, p. 499.

Appellant further makes the point that the averments of the bill, the evidence and the decree do not correspond, and in support of this contention refers to the copy of the trust deed attached to the bill as an exhibit. The bill did not allege that the copy was a true one, but only that it was substantially correct, and exhibits as described in other parts of the bill correspond with the proof and the decree. We think this was sufficient. Price v. Solberg, 269 Ill. 459, p. 462; Dempster v. Lansingh, 244 Ill. 462. Nor do we think there is any merit in appellant's contention that the bill is framed on different and inconsistent theories. 21 Corpus Juris, 415; Henderson v. Harness, 184 Ill. 520.

The controlling question in the case is whether the findings of the chancellor, made from the conflicting evidence, are clearly and palpably erroneous. If so, the decree should be set aside; if not, it should be affirmed. That such is the rule to be applied is elementary and so well settled that the citation of authorities would seem to be unnecessary. Upon the controlling questions of fact - whether the trust deed was executed and delivered, whether the loan was to be secured by it, as complainant averred, or by jewelry as defendant claimed, whether the story of the promised delivery of a barrel of alcohol was true or untrue, whether the defendant delivered the abstract of title to Mrs. Burr, or Mrs. Burr surreptitiously took the same away - there is a direct conflict in the evidence. Moreover, it is such a conflict as makes it impossible to believe that one or the other of the parties might be mistaken. The unpleasant duty of determining which of the witnesses testified falsely devolved upon the trial court; and, as already said, the question here is

117; Keton v. Truesdale, 40 Mich. 1, p. 6; Jackson v. Crouser, 218 Ill. 494, p. 499.

Appellant further makes the point that the averments of the bill, the evidence and the decree do not correspond, and in support of this contention refers to the copy of the trust deed attached to the bill as an exhibit. The bill did not allege that the copy was a true one, but only that it was substantially correct, and exhibits as described in other parts of the bill corresponding with the proof and the decree. We think this was sufficient. Price v. Dolbert, 289 Ill. 498, p. 452; Dempster v. Langtry, 244 Ill. 462. Nor do we think there is any merit in appellant's contention that the bill is framed on different and inconsistent theories. 21 Corpus Juris, 418; Henderson v. Harness, 184 Ill. 320.

The controlling question in the case is whether the findings of the chancellor, made from the conflicting evidence, are clearly and palpably erroneous. If so, the decree should be set aside; if not, it should be affirmed. That such is the rule to be applied is elementary and so well settled that the citation of authorities would seem to be unnecessary. Upon the controlling questions of fact - whether the trust deed was executed and delivered, whether the loan was to be secured by it, as complainant averred, or by jewelry as defendant claimed, whether the story of the promised delivery of a barrel of alcohol was true or untrue, whether the defendant delivered the abstract of title to Mrs. Burr, or Mrs. Burr surreptitiously took the same away - there is a direct conflict in the evidence. Moreover, it is such a conflict as makes it impossible to believe that one or the other of the parties might be mistaken. The unpleasant duty of determining which of the witnesses testified falsely devolved upon the trial court; and, as already said, the question here is

whether the chancellor was clearly and palpably wrong. In such a case we may not disregard the undoubted advantage which the chancellor has in seeing and hearing the witnesses.

Uncontradicted evidence tends to show that Mae Burr became acquainted with the defendant Mrs. Rossler April 22, 1918. Mrs. Rossler conducted a rooming house at 3171 Ellis avenue, the premises here in controversy. Mrs. Burr lived there with Mrs. Rossler from April 22, 1918, until June 19, 1919. On that date she left the house after an altercation, on account of which Mrs. Rossler took out a warrant, charging her with the violation of a city ordinance, and Mrs. Rossler claimed upon the hearing of that case that Mrs. Burr had struck her with a club. Judge Newcomer of the Municipal court, who heard the case, fined the complainant one dollar for her offense. Mrs. Burr was a widow, who, prior to taking rooms with Mrs. Rossler, lived at Morrison, Illinois. She was the manager of the Memorial Hospital, an institution controlled by Dr. Johnson. This hospital was situated at 460 East 32nd street, in the neighborhood in which Mrs. Rossler lived. In addition to keeping roomers Mrs. Rossler was the part owner of a business in toilet articles, perfumery, etc. It was conducted by one Hishakawa, who lived in her house. Mrs. Rossler's home was incumbered by a mortgage or trust deed in the sum of $2,800, which was held by Mead & Coe. This loan matured October 2, 1918. At the request of Mrs. Rossler Mae Burr secured from the bank at Morrison a cashier's check for $2,238.96, dated October 10, 1918, and endorsed the same to Mrs. Rossler, who turned it over to Mead & Coe in part payment of the indebtedness; $2,300 was paid on this indebtedness October 11, 1918, the difference between that amount and the check being paid in currency.

whether the chancellor was clearly and palpably wrong. In such a case we may not disregard the undoubted advantage which the chancellor has in seeing and hearing the witnesses.

Uncontradicted evidence tends to show that Mae Burr became acquainted with the defendant Mrs. Rosaler April 22, 1918. Mrs. Rosaler conducted a rooming house at 3171 Xilla avenue, the premises here in controversy. Mrs. Burr lived there with Mrs. Rosaler from April 22, 1918, until June 19, 1918. On that date she left the house after an altercation, on account of which Mrs. Rosaler took out a warrant, charging her with the violation of a city ordinance, and Mrs. Rosaler claimed upon the hearing of that case that Mrs. Burr had struck her with a club. Judge Newcomer of the Municipal court, who heard the case, fined the complainant one dollar for her offense. Mrs. Burr was a widow, who, prior to taking rooms with Mrs. Rosaler, lived at Morrison, Illinois. She was the manager of the Memorial Hospital, an institution controlled by Dr. Johnson. This hospital was situated at 450 East 32nd street, in the neighborhood in which Mrs. Rosaler lived. In addition to keeping rooms Mrs. Rosaler was the part owner of a business in toilet articles, perfumery, etc. It was conducted by one Blankenaw, who lived in her house. Mrs. Rosaler's home was incumbered by a mortgage or trust deed in the sum of $2,800, which was held by Mead & Coe. This loan matured October 3, 1918. At the request of Mrs. Rosaler Mae Burr secured from the bank at Morrison a cashier's check for $2,838.96, dated October 10, 1918, and endorsed the same to Mrs. Rosaler, who turned it over to Mead & Coe in part payment of the indebtedness; $2,800 was paid on this indebtedness October 11, 1918, the difference between that amount and the check being paid in currency.

October 14th another payment was made, in which the check of Mrs. Burr for $404 was used and, the loan being paid, the abstract of the property, which had been held by Mead & Coe, was delivered to Mrs. Rossler. Mrs. Burr testifies that she advanced this money at the solicitation of Mrs. Rossler after consulting with her relative, Mr. Norish, who was connected with the bank at Morrison, Illinois; that he advised her to have an attorney handle the matter for her; and she says that she told Mrs. Rossler she would loan the money to her if Mrs. Rossler would give a first mortgage on the property and make notes payable one each month, with interest at 6 per cent; that Mrs. Rossler agreed that complainant's attorney should draw the papers; that thereafter the complainant Burr was taken down with the flu, and while she was ill Mrs. Rossler represented to her that the mortgage would be foreclosed, and that upon Mrs. Rossler's promise to execute the papers afterwards, she, complainant, turned over the checks; that when the last check for $404 was given she also turned over to Mrs. Rossler currency to make up the balance of the loan, and that Mrs. Rossler afterwards returned to her the sum of $34, which was not needed; that defendant said she would make different notes in groups of three, the first two of each group being for the sum of $33 each and the third for the sum of $34, making $100 of the principal, which she would pay every three months; that on either the 18th or 19th of the month Mrs. Rossler came to complainant's room and laid the abstract and notes on witness' desk and said that she had fulfilled that part of her promise; that just as soon as she was able she would go to the attorney's office and have the trust deed made out. It is undisputed that the notes which are in evidence are in Mrs. Rossler's handwriting. The first one is dated October 15, 1918, and the first nine of the series were paid.

October 14th another payment was made, in which the check of Mrs. Burr for $404 was used and, the loan being paid, the abstract of the property, which had been held by Hood & Coe, was delivered to Mrs. Hoesler. Mrs. Burr testifies that she advanced this money at the solicitation of Mrs. Hoesler after consulting with her relative, Mr. Horlan, who was connected with the bank at Morrison, Illinois; that he advised her to have an attorney handle the matter for her; and she says that she told Mrs. Hoesler she would loan the money to her if Mrs. Hoesler would give a first mortgage on the property and make notes payable one each month, with interest at 6 per cent; that Mrs. Hoesler agreed that complainant's attorney should draw the papers; that thereafter the complainant Burr was taken down with the flu, and while she was ill Mrs. Hoesler represented to her that the mortgage would be foreclosed, and that upon Mrs. Hoesler's promise to execute the papers afterwards, she, complainant, turned over the checks; that when the last check for $404 was given she also turned over to Mrs. Hoesler enough to make up the balance of the loan, and that Mrs. Hoesler afterwards returned to her the sum of $34, which was not needed; that defendant said she would make different notes in groups of three, the first two of each group being for the sum of $35 each and the third for the sum of $44, making $100 of the principal, which she could pay every three months; that, on either the 16th or 19th of the month Mrs. Hoesler came to complainant's room and held the abstract and notes on witness' desk and said that she had fulfilled that part of her promise; that as soon as she was able she would go to the attorney's office and have the trust deed made out. It is undisputed that the notes which are in evidence are in Mrs. Hoesler's handwriting. The first one is dated October 19, 1918, and the first nine of the series were paid.

Mrs. Burr testifies further that on October 28, 1918, when she was sitting at her table in the sitting room, Mrs. Rossler came in and handed to her a paper, saying, "There is your trust deed." She also testifies that the abstract was handed to her with the notes on the 18th of the month, when Mrs. Rossler brought the notes and left them with her. She says that she looked the trust deed over; that it was in Mrs. Rossler's handwriting; that the words "trust deed" were written at the top, and that the amount, $2,766, was also written in it and also Dr. Johnson's name as trustee, and that it contained a description of the notes. She says that she compared the description of the real estate as it appeared in the trust deed with the description of the same as it appeared in the abstract, and that these corresponded. She further says that she called the attention of Mrs. Rossler to the fact that the deed had not been acknowledged, and that Mrs. Rossler said there was a notary public just about a block away, and that she could have it acknowledged if desired.

Mrs. Burr further says that she then put the deed in an envelope and placed it in her desk and the next day took it over and showed it to Dr. Johnson; that she took it back home in the evening and put it in the envelope with other papers and put it in her desk; that the papers remained there two or three days; that when Dr. Johnson called she went to her room, got the notes and the abstract and gave him the envelope. She says that she sealed the envelope as she went down the steps, and gave it to Dr. Johnson, and that she has never seen it since. She further says that she gave it to him to take and put in his safe down town, because she could not lock her desk, and she took the notes and the abstract and put them in the safe at the hospital.

Mrs. Burr also describes how in January, 1919, she asked Dr. Johnson for the trust deed, and that later he called

Mrs. Burr testifies further that on October 26, 1918, when she was sitting at her table in the sitting room, Mrs. Hosslar came in and handed to her a paper, saying, "There is your trust deed." She also testifies that the abstract was handed to her with the notes on the 18th of the month, when Mrs. Hosslar brought the notes and left them with her. She says that she looked the trust deed over; that it was in Mrs. Hosslar's handwriting; that the words "trust deed" were written at the top, and that the amount, $2,700, was also written in it and also Dr. Johnson's name as trustee, and that it contained a description of the notes. She says that she compared the description of the real estate as it appeared in the trust deed with the description of the same as it appeared in the abstract, and that these corresponded. She further says that she called the attention of Mrs. Hosslar to the fact that the deed had not been acknowledged, and that Mrs. Hosslar said there was a notary public just about a block away, and that she could have it acknowledged if desired.

Mrs. Burr further says that she then put the deed in an envelope and placed it in her desk and the next day took it over and showed it to Dr. Johnson; that she took it back home in the evening and put it in the envelope with other papers and put it in her desk; that the papers remained there two or three days; that when Dr. Johnson called she went to her room, got the notes and the abstract and gave him the envelope. She says that she sealed the envelope as she went down the steps, and gave it to Dr. Johnson, and that she had never seen it since. She further says that she gave it to him to take and put in his safe down town, because she could not lock her desk, and she took the notes and the abstract and put them in the safe at the hospital.

Mrs. Burr also describes how in January, 1919, she asked Dr. Johnson for the trust deed, and that later he called

back and told her that the deed was not there; that a search was made for it without avail; that she told Mrs. Rossler of the loss and that Mrs. Rossler said that if it was not found she would execute a new one; that repeated dates were set for doing this, but that Mrs. Rossler each time made some excuse; that after six or eight different appointments, Mrs. Rossler on June 19th came to complainant's room just as she was about to leave, and complainant then told her that this matter could not be put off any longer; that they must go either that day or the day after; that Mrs. Rossler then told her that she and Dr. Johnson were hiding the trust deed; that complainant replied that this was absurd, when Mrs. Rossler flew into a rage and said that she had called her a thief; that when complainant thereupon started to leave the house, Mrs. Rossler grabbed hold of her, pulled her back, called for Noshi, meaning Hishikawa, who came out of the basement, and while Mrs. Rossler was telling him that she had been called a thief, complainant walked out and over to the hospital, and next saw Mrs. Rossler at the Clark street police station, where she appeared in response to the charge made against her.

Mrs. Burr further testifies positively that there was no mention of diamonds or jewelry given as security for the money in fact, and that no such alleged fact was claimed to be true upon the trial of that case.

On the contrary Mrs. Rossler testifies that Mrs. Burr came to her home the last of August and said that she wanted a store room in the basement to put in $5,000 worth of alcohol, the price of which she said she thought was going up; that Mrs. Rossler told her she would rent the room for that purpose, but would not be responsible for what happened to the

back and told her that the deed was not there; that a search was made for it without avail; that she told Mrs. Rossler of the loss and that Mrs. Rossler said that if it was not found she would execute a new one; that repeated dates were set for doing this, but that Mrs. Rossler each time made some excuse; that after six or eight different appointments, Mrs. Rossler on June 19th came to complainant's room just as she was about to leave, and complainant then told her that this matter could not be put off any longer; that they must go either that day or the day after; that Mrs. Rossler then told her that she and Dr. Johnson were holding the trust deed; that complainant replied that this was absurd, when Mrs. Rossler flew into a rage and said that she had called her a liar; that when complainant thereupon started to leave the house, Mrs. Rossler grabbed hold of her, pulled her back, called for Noah, meaning Hawkins, who came out of the basement, and while Mrs. Rossler was telling him that she had been called a liar, complainant walked out and over to the hospital, and next saw Mrs. Rossler at the Clark street police station, where she appeared in response to the charge made against her.

Mrs. Herr further testifies positively that there was no mention of diamonds or jewelry given as security for the money in fact, and that no such alleged fact was claimed to be true upon the trial of that case.

On the contrary Mrs. Rossler testifies that Mrs. Herr came to her home the last of August and said that she wanted a store room in the basement to put in $5,000 worth of alcohol, the price of which she said she thought was going up; that Mrs. Rossler told her she would rent the room for that purpose, but would not be responsible for what happened to the

liquid; that Mrs. Rossler then said that they would be getting alcohol for use in their business, and she had a mortgage that was coming due; that Mrs. Burr asked her how much, to which defendant replied, "Why, $2,500 will do," and that Mrs. Burr then said that she would let her have a barrel of alcohol at wholesale price, which they agreed would be $5.32 a gallon; that about the 1st of September Mrs. Rossler told Mrs. Burr that the Globe Insurance man had offered a loan of $2,500 on monthly payments of $25 a month; that a Mr. Hoy of the Insurance company was there negotiating the loan, and Mrs. Burr made a motion to Mrs. Rossler indicating to Mrs. Rossler that she would like to have Mrs. Rossler go out, which she, Mrs. Rossler, did, when Mrs. Burr said to her, "Don't make a loan with that man; I will let you have the money;" that on the evening of that day Mrs. Burr came to her and said that she would let her have $5,000 if she would take her in as a partner in the toilet business; that Mrs. Rossler said she would have to talk it over with Noshi; that Noshi and Mrs. Rossler and Mrs. Burr talked it over, and then informed Mrs. Burr that they would not have a partner at that time; that Mrs. Burr then said, "Well, I will let you have the money and I will trust you;" that the witness then told Mrs. Burr $5,000 was too much, that $2,500 was enough, and further said she would like to pay back $100 every three months, and that the notes were therefore drawn in series of $33, $33 and $34 a month.

Mrs. Rossler testifies, "So she said, 'We will make the notes out, and you make 75 notes for the loan and eight notes for the alcohol,' and the notes were to be made in series of two $33 notes and one $34 note. About the last of September I asked her if she would let me have $2,500. It was just before the loan became due. She said yes, she will be ready.

liquid; that Mrs. Rosaler then said that they would be getting alcohol for use in their business, and she had a mortgage that was coming due; that Mrs. Burr asked her how much, to which defendant replied, "Why, $2,500 will do," and that Mrs. Burr then said that she would let her have a barrel of alcohol at wholesale price, which they agreed would be $5.25 a gallon; that about the 1st of September Mrs. Rosaler told Mrs. Burr that the Globe Insurance man had offered a loan of $2,500 on monthly payments of $25 a month; that a Mr. Hoy of the Insurance company was there negotiating the loan, and Mrs. Burr made a motion to Mrs. Rosaler indicating to Mrs. Rosaler that she would like to have Mrs. Rosaler go out, which she, Mrs. Rosaler, did, when Mrs. Burr said to her, "Don't make a loan with that man; I will let you have the money;" that on the evening of that day Mrs. Burr came to her and said that she would let her have $5,000 if she would take her in as a partner in the toilet business; that Mrs. Rosaler said she would have to talk it over with Mosbi; that Mosbi and Mrs. Rosaler and Mrs. Burr talked it over, and then informed Mrs. Burr that they would not have a partner at that time; that Mrs. Burr then said, "Well, I will let you have the money and I will trust you;" that the witness then told Mrs. Burr $5,000 was too much, that $2,500 was enough, and further said she would like to pay back $100 every three months, and that the notes were therefore drawn in sums of $25, $35 and $34 a month.

Mrs. Rosaler testifies, "So she said, 'I will make the notes out, and you make 75 notes for the loan and eight notes for the alcohol;' and the notes were to be made in sums of two $35 notes and one $34 note. About the last of September I asked her if she would let me have $2,500. It was just before the loan became due. She said yes, she will be ready.

There was nothing about security, she let me have the money without security; she said I should clear my house. She says she has money in the bank which is not bringing her one cent of interest and she would like to get six per cent. interest on her money." She further says, "Mrs. Burr gave me no cash either the first or second time. I gave the second check for $404 to Mr. Bennett at Mead & Coe's and paid him cash at that time; enough to make up the $2,800 - I think it was $158. I paid him in cash from my own money." She says that on that day she returned to Mrs. Burr $75 in currency and $143 on the next day. She says that Mrs. Burr got the forms of the notes and the amount of these was all figured up before; that she then made out 75 notes for $2,500 and 8 notes for the alcohol. She says it took her nearly a month to make out the notes, and that there was no mention of security during that time; that October 14th she brought the abstract home and that she placed it on the table, and that Mrs. Rossler and Noshi and Mrs. Burr looked it over; that she then put it in a box with other papers in the side-board, and that before she got the notes finished Mrs. Burr told her that Dr. Johnson was as "mad as a wet hen" because she did not have security for the notes, and that she must get security for them. She says, "I said to her, 'Do you think I want to beat you out of your money?' and she says, 'Not that, but you have jewelry which you could let me have,' and I asked her, 'What kind of jewelry do you mean?' and she says, 'That yellow amber set that you showed me a couple of weeks ago,' and I says, 'If you think I am dishonest, I will let you have the jewelry.' She said, 'Yes.' The next talk about the loan or the notes or the jewelry was not until the 11th day of November, 1918." She remembers this date because it was Armistice day. She says that Mrs. Burr asked her if they could settle up that

There was nothing about security, she let me have the money without security; she said I should clear my house. She says she has money in the bank which is not bringing her one cent of interest and she would like to get six per cent. interest on her money." She further says, "Mrs. Burr gave me no cash either the first or second time. I gave the second check for $604 to Mr. Bennett at Mead & Coe's and paid him cash at that time; enough to make up the $2,800 - I think it was $128. I paid him in cash from my own money." She says that on that day she returned to Mrs. Burr $75 in currency and $142 on the next day. She says that Mrs. Burr got the forms of the notes and the amount of these was all figured up before; that she then made out 75 notes for $2,500 and 8 notes for the alcohol. She says it took her nearly a month to make out the notes, and that there was no mention of security during that time; that October 11th she brought the abstract home and that she placed it on the table, and that Mrs. Hoagler and Noahl and Mrs. Burr looked it over; that she then put it in a box with other papers in the side-board, and that before she got the notes finished Mrs. Burr told her that Dr. Johnson was an "old as a wet hen" because she did not have security for the notes, and that she must get security for them. She says, "I said to her, 'Do you think I want to beat you out of your money?' and she says, 'Not that, but you have jewelry which you could let me have,' and I asked her, 'What kind of jewelry do you mean?' and she says, 'That yellow amber set that you showed me a couple of weeks ago,' and I says, 'If you think I am dishonest, I will let you have the jewelry.' She said, 'Yes.' The next talk about the loan or the notes or the jewelry was not until the 11th day of November, 1918." She remembers this date because it was Armistice day. She says that Mrs. Burr asked her if they could settle up that

little matter if she got the notes and the jewelry ready, and that she, Mrs. Rossler, said "Yes;" that she came and got a tray and put the jewelry on it - eight pieces of transparent amber, a rose in the center of the necklace, with a two carat diamond, and a bracelet with fourteen stones, and a rose in the center with two carat diamonds, and a brooch and a rose of twelve small leaves and two carat diamonds, a ring and a smaller rose, with two carat diamonds, two earrings of the same size like the ring, and two hairpins with roses as large as the roses in the center of the necklace.

Mrs. Rossler says she told Mrs. Burr to make her a receipt for the jewelry, but Mrs. Burr said she had left her glasses in the hospital, so she called up Noshi, the chemist, she rapped on the radiator for him; that Noshi wrote out two receipts with ink, which Mrs. Burr signed; that one of these was handed to Mrs. Burr; that Mrs. Rossler kept the other paper, which, however, she has lost, but Noshi kept a copy of it. She says that this receipt for the diamonds disappeared at the same time that she lost her abstract to the premises; that she put the receipt in a box back in the side-board and has never seen it since, but that she missed it between Christmas and New Year in 1918. She says that between Armistice day and Thanksgiving in 1918 she had a conversation with Mrs. Burr in the presence of Noshi, in which Mrs. Burr said she had been down town and had the jewelry appraised, and was surprised to find that it was worth more than Mrs. Rossler had said it was; that it was in fact worth $6,500.

She further testified that the jewelry was purchased Christmas week in 1883 in Paris; that 6,500 francs were paid for it; that it was bought by her uncle, who has been long dead. She says that she told Mrs. Burr after her return from

little matter if she got the notes and the jewelry ready, and that she, Mrs. Rosaler, said "Yes;" that she came and got a tray and put the jewelry on it - eight pieces of transparent amber, a rose in the center of the necklace, with a two carat diamond, and a bracelet with fourteen stones, and a rose in the center with two carat diamonds, and a brooch and a rose of twelve small leaves and two carat diamonds, a ring and a small-er rose, with two carat diamonds, two earrings of the same size like the ring, and two hairpins with roses as large as the roses in the center of the necklace.

Mrs. Rosaler says she told Mrs. Burr to make her a receipt for the jewelry, but Mrs. Burr said she had left her glasses in the hospital, so she called up Noah, the chemist, she rapped on the radiator for him; that Noah wrote out two receipts with ink, which Mrs. Burr signed; that one of these was handed to Mrs. Burr; that Mrs. Rosaler kept the other paper, which, however, she has lost, but Noah kept a copy of it. She says that this receipt for the diamonds disappeared at the same time that she lost her abstract to the premises; that she put the receipt in a box back in the side-board and has never seen it since, but that she placed it between Christmas and New Year in 1918. She says that between Armistice day and Thanksgiving in 1918 she had a conversation with Mrs. Burr in the presence of Noah, in which Mrs. Burr said she had been down town and had the jewelry appraised, and was surprised to find that it was worth more than Mrs. Rosaler had said it was; that it was in fact worth $6,500.

She further testified that the jewelry was purchased Christmas week in 1883 in Paris; that 3,500 francs were paid for it; that it was bought by her uncle, who has been long dead. She says that she told Mrs. Burr after her return from

Morrison, after Christmas, about the loss of the abstract, deed, etc., and that Mrs. Burr said, "That is too bad; have you any idea who got it?" Mrs. Rossler further says that on June 12th she paid two of her notes to Mrs. Burr, and that Mrs. Burr had promised to bring her six more notes which she was to take up, and that instead of that Mrs. Burr brought her only two notes; that she asked her why she did not bring all the notes and settle the matter that she owed, "and she says she wont give me anything; she wont give me no notes any more, and I told her, why she owed me the room rent and I paid her the difference, and I would get the first piece of jewelry back as a treat, and then she got very sore and told me she would take everything away from me, and not give me any notes, nothing any more. We had a few words and I told her that I must have the notes back, I will say something, and she says, 'You would?' and then when I turned around to make the bed and spread up the bed, then she struck me here on the head with a walking cane; and when I turned around she struck me across my lips and here is my lips still scarred where she split them and knocked two teeth loose and bleeding."

Such are the conflicting accounts given of this transaction by the principal parties to it. Mrs. Burr is corroborated by Dr. Johnson, who testifies that he received the trust deed from her and lost it. She is further corroborated by the fact that she has possession of the abstract, and in some particulars seems to be corroborated by the testimony of Henry C. Bennett, who acted for Mead & Coe in the transaction whereby the first mortgage was paid.

Mrs. Rossler's testimony as to the amount of the loan and the jewelry and the alcohol is denied in every particular by Mrs. Burr. Mrs. Rossler is corroborated by her partner, Hishikawa,

Morrison, after Christmas, about the loss of the abstract, deed, etc., and that Mrs. Burr said, "That is too bad; have you any idea who got it?" Mrs. Hosaler further says that on June 12th she paid two of her notes to Mrs. Burr, and that Mrs. Burr had promised to bring her six more notes which she was to take up, and that instead of that Mrs. Burr brought her only two notes; that she asked her why she did not bring all the notes and settle the matter that she owed, "and she says she went give me anything; she went give me no notes any more, and I told her, why she owed me the room rent and I paid her the difference, and I would get the first piece of jewelry back as a treat, and then she got very sore and told me she would take everything away from me, and not give me any notes, nothing any more. We had a few words and I told her that I must have the notes back, I will say something, and she says, 'You would?' and then when I turned around to make the bed and spread up the bed, then she struck me here on the head with a walking cane; and when I turned around she struck me across my lips and here is my lips still scarred where she split them and knocked two teeth loose and bleeding."

Such are the conflicting accounts given of this transaction by the principal parties to it. Mrs. Burr is corroborated by Dr. Johnson, who testifies that he received the trust deed from her and lost it. She is further corroborated by the fact that she has possession of the abstract, and in some particulars seems to be corroborated by the testimony of Henry C. Bennett, who acted for Mead & Coe in the transaction whereby the first mortgage was paid.

Mrs. Hosaler's testimony as to the amount of the loan and the jewelry and the alcohol is denied in every particular by Mrs. Burr. Mrs. Hosaler is corroborated by her partner, Hinkleman,

and in part by a roomer named Frank Dunn as to the jewelry and by a real estate agent named Stricklin as to the possession of the abstract. The testimony of both these witnesses is also denied in every material particular by Mrs. Burr.

As we have already said, the only question before this court is whether the chancellor palpably erred in the matter. Without further discussing the evidence, which would require the extension of this opinion to an unwarranted length, there are several respects in which, considering all the evidence, which we have carefully done, we find ourselves unable to say that the chancellor erred. In the first place, the complainant gives the more probable account of the transaction, an account which better harmonizes with the undisputed facts in the case. In the second place, Mrs. Rossler's account of the transaction is, we think, very much discredited by certain of her own pleadings which appear in the record. She filed an answer to the original bill, in which she admitted that the amount of the original loan was $2,800, and that in the transaction she returned to Mrs. Burr $34 in cash, as alleged in complainant's bill. It is true that when the case was practically ended she claimed that this was an inadvertence on the part of her attorneys; but this claim is hardly credible in view of the fact that it was only in her answer and cross-bill, filed more than four months thereafter, that she alleged a loan of $2,500 instead of $2,800, as charged in the bill.

The recollection, too, of Judge Newcomer, who appears to have been a fair and disinterested witness, is to the effect that the controversy between these women arose about a trust deed; and while he thinks some mention was made at that hearing about a diamond, it is clear from his testimony that no such transaction in diamonds or jewelry as has since been claimed was mentioned at that time.

and in part by a roomer named Frank Dunn as to the jewelry and by a real estate agent named Strickfiln as to the possession of the abstract. The testimony of both these witnesses is also denied in every material particular by Mrs. Burr.

As we have already said, the only question before this court is whether the chancellor palpably erred in the matter. Without further discussing the evidence, which would require the extension of this opinion to an unwarranted length, there are several respects in which, considering all the evidence, which we have carefully done, we find ourselves unable to say that the chancellor erred. In the first place, the complainant gives the more probable account of the transaction, an account which better harmonizes with the undisputed facts in the case. In the second place, Mrs. Hessler's account of the transaction is, we think, very much discredited by certain of her own pleadings which appear in the record. She filed an answer to the original bill, in which she admitted that the amount of the original loan was $2,800, and that in the transaction she returned to Mrs. Burr $94 in cash, as alleged in complainant's bill. It is true that when the case was practically ended she claimed that this was an inadvertence on the part of her attorney; but this claim is hardly credible in view of the fact that it was only in her answer and cross-bill, filed more than four months thereafter, that she alleged a loan of $2,500 instead of $2,800, as charged in the bill.

The recollection, too, of Judge Newcomer, who appears to have been a fair and disinterested witness, is to the effect that the controversy between these women arose about a trust deed; and while he thinks some mention was made at that hearing about a diamond, it is clear from his testimony that no such transaction in diamonds or jewelry as has since been claimed was mentioned at that time.

The defendant's story as to the alcohol transaction is also most improbable. Why should she give notes for alcohol not yet delivered? Why include these notes with the notes given for the loan? And why pay the same without demanding the delivery of the alcohol?

We have carefully read all the evidence but can not conclude that the findings of the chancellor are "clearly and palpably" erroneous, and the decree will therefore be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

The defendant's story as to the alcohol transaction is also most improbable. Why should she give notes for alcohol not yet delivered? Why include these notes with the notes given for the loan? And why pay the same without demanding the delivery of the alcohol?

We have carefully read all the evidence but can not conclude that the findings of the chancellor are "clearly and palpably" erroneous, and the decree will therefore be affirmed.

AFFIRMED.

McGuire, J. J., and Dever, J., concur.

65 - 27535

HENRY J. KARSTENS & COMPANY,
a corporation,
Appellee,

vs.

LAWRENCE C. O'BRIEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $825.04, entered upon the finding of the court. The plaintiff sued for a balance of the amount claimed to be due for goods sold and delivered. The defense was that on October 21, 1920, defendant paid to plaintiff the sum of $1,825.04 in full of all demands to that date.

The defendant testified that he had been doing business with the plaintiff for five or six years; that during that time he paid monthly statements from time to time. He testified: "On October 21, 1920, I paid the account due them by check and $825.04 in cash. The check was for $1,000. I brought it to the office of the plaintiff, and saw John Karstens. Had no conversation with him at that time, only paid the bill. They were pressing me for payment. The bills I paid with were $100 bills, five of them, I think. I bank at the Cosmopolitan State Bank. I have not the check I paid the $1,000 with. Nobody was in the office at the time the bill was paid. I suppose I received the check back from the bank. I received a statement from the plaintiff after October 21, 1920." The defendant further testified that he could not tell exactly when he received the statement; that it was after he paid the bill; that the balance shown was $825.04; that when he received the statement he looked for the

HENRY J. KARSTEDT & COMPANY,
a corporation,
Appellee,

vs.

LAWRENCE C. O'BRIEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $825.04, entered upon the finding of the court. The plaintiff sued for a balance of the amount claimed to be due for goods sold and delivered. The defense was that on October 21, 1930, defendant paid to plaintiff the sum of $1,325.04 in full of all demands to that date.

The defendant testified that he had been doing business with the plaintiff for five or six years; that during that time he paid monthly statements from time to time. He testified: "On October 21, 1930, I paid the account due them by check and $325.04 in cash. The check was for $1,000. I brought it to the office of the plaintiff, and saw John Karstedt. Had no conversation with him at that time, only paid the bill. They were presenting me for payment. The bills I paid with were $100 bills, five of them, I think. I bank at the Cosmopolitan State Bank. I have not the check I paid the $1,000 with. Nobody was in the office at the time the bill was paid. I suppose I received the check back from the bank. I received a statement from the plaintiff after October 21, 1930." The defendant further testified that he could not tell exactly when he received the statement; that it was after he paid the bill; that the balance shown on $825.04; that when he received the statement he looked for the

original bill and drove down to Karstens', who was not in; that he did not get any statement after that, that he remembered; he thought Mr. Mitchell, a salesman for the plaintiff, called on him with reference to the balance claimed to be due; that when Mitchell asked him how about the balance defendant replied: "What balance?" Mitchell answered "$825.04" and that defendant said "I guess you must have been drinking or something;" that he showed Mitchell the bill which Mitchell wished to take down to the store, but defendant would not let him have it. The witness further testified that at the time he made payment of the account he received a receipt in full, and this receipt was offered in evidence.

Mr. Karstens for the plaintiff testified that defendant made a payment of only $1,000 on account on October 21st; that this payment was by check, and that the witness received the check in a letter addressed to the plaintiff; that by mistake he marked the bill as paid and mailed it back to the defendant. He says positively that defendant was not in plaintiff's place of business on October 21, 1920, and did not pay any cash on account of the bill on that day. The testimony of Mr. Karstens is corroborated by the memorandum made on the stub of the check book and by the bank book, showing the deposit made by plaintiff on that day. Karstens further testified that he met the defendant about two and a half months later and talked with him about the balance; that defendant then said he did not owe it, and that he had a receipted bill. The witness says "I said I understood he had but you know that ain't right. 'Well, I am going to look it up' he says, 'if I owe it to you, I will pay it.'" Karstens further says that he went over to defendant's house afterwards and had a talk with him about the bill, and defendant again said he was going to look it up, and that he had just come back from Springfield. Defendant, however,

original bill and drove down to Karstens', who was not in; that he did not get any statement after that, that he remembered; he thought Mr. Mitchell, a salesman for the plaintiff, called on him with reference to the balance claimed to be due; that when Mitchell asked him how about the balance defendant replied: "What balance?" Mitchell answered "$225.04" and that defendant said "I guess you must have been drinking or something;" that he showed Mitchell the bill which Mitchell wished to take down to the store, but defendant would not let him have it. The witness further testified that at the time he made payment of the account he received a receipt in full, and this receipt was offered in evidence.

Mr. Karstens for the plaintiff testified that defendant made a payment of only $1,000 on account on October 21st; that this payment was by check, and that the witness received the check in a letter addressed to the plaintiff; that by mistake he marked the bill as paid and mailed it back to the defendant. He says positively that defendant was not in plaintiff's place of business on October 21, 1920, and did not pay any cash on account of the bill on that day. The testimony of Mr. Karstens is corroborated by the memorandum made on the stub of the check book and by the bank book, showing the deposit made by plaintiff on that day. Karstens further testified that he met the defendant about two and a half months later and talked with him about the balance; that defendant then said he did not owe it, and that he had a receipted bill. The witness says "I said I understood he had but you know that ain't right. 'Well, I am going to look it up' he says, 'if I owe it to you, I will pay it.'" Karstens further says that he went over to defendant's house afterwards and had a talk with him about the bill, and defendant again said he was going to look it up, and that he had just come back from Springfield. Defendant, however,

never came back to see the witness or talk about the matter. The usual custom of the defendant was to pay sometimes in currency and sometimes by check.

Mr. Mitchell testified that he had been a salesman for plaintiff for twenty-one years and knew the defendant; that he, the witness, made out and personally mailed to the defendant statements from plaintiff's books; that afterwards he called on the defendant about January 1, 1921, and asked him to pay the balance, and that defendant said he would look it up, but that he had paid it; that after two or three calls, defendant showed the witness the receipt. The conversations to which this witness testified are not denied by the defendant.

There is no dispute as to the law applicable. The burden of proof is on the adverse party to overcome the recitals of a receipt by clear and unmistakable evidence. Fitzgerald v. Coleman, 114 Ill. App. 25; Ennis v. Pullman Palace Car Co., 165 Ill. 161. The law as laid down in these decisions was the law which it was the duty of the trial court to apply to the facts in the record. In this court, however, the decision of the trial court on a contradicted issue of fact is binding, unless manifestly against the weight of the evidence. Rinehart v. Shedd, 207 Ill. App. 138; Pirola v. Fladmark, 190 Ill. App. 57; Mason v. Kraig, 191 Ill. App. 1.

The testimony of defendant is corroborated by the receipt, but defendant's evidence is denied, and the receipt is explained by the evidence of Karstens, which is corroborated by the books mentioned. There are also certain improbabilities in the testimony of defendant. It appears that he had a bank account, and the question naturally arises, in view of that fact, why he should carry on his person over $800 in currency. It

never came back to see the witness or talk about the matter. The usual custom of the defendant was to pay sometimes in currency and sometimes by check.

Mr. Mitchell testified that he had been a salesman for plaintiff for twenty-one years and knew the defendant; that he, the witness, made out and personally mailed to the defendant statements from plaintiff's books; that afterwards he called on the defendant about January 1, 1921, and asked him to pay the balance, and that defendant said he would look it up, but that he had paid it; that after two or three calls, defendant showed the witness the receipt. The conversations to which this witness testified are not denied by the defendant.

There is no dispute as to the law applicable. The burden of proof is on the adverse party to overcome the recitals of a receipt by clear and unmistakable evidence. Fitzgerald v. Coleman, 114 Ill. App. 22; Gunis v. Pullman Palace Car Co., 165 Ill. 191. The law as laid down in these decisions was the law which it was the duty of the trial court to apply to the facts in the record. In this court, however, the decision of the trial court on a contradicted issue of fact is binding, unless manifestly against the weight of the evidence. Hinchert v. Shedd, 207 Ill. App. 138; Jirola v. Fiborek, 164 Ill. App. 87; Mason v. Kraik, 101 Ill. App. 1.

The testimony of defendant is corroborated by the receipt, but defendant's evidence is denied, and the receipt is explained by the evidence of Kersten, which is corroborated by the books mentioned. There are also certain improbabilities in the testimony of defendant. It appears that he has a bank account, and the question naturally arises, in view of that fact, why he should carry on his person over $800 in currency. It

appears that repeated statements for the balance were received by him without protest or demand for explanation. It appears too that after getting the receipt in full he at once quit trading at plaintiff's place, although he had been buying from plaintiff continuously for five or six years prior thereto. The statements which he made from time to time that he "would look the matter up" are hardly the statements of one who had made full payment.

We realize that an appellate court is at a great disadvantage in passing upon a matter of this kind. The opportunities of the trial judge for getting to the truth of such a matter are far superior to those of an appellate tribunal. Upon the whole record we are unable, we think, to say that the finding of the trial Judge, who saw these witnesses, is against the manifest weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

appears that repeated statements for the balance were received by him without protest or demand for explanation. It appears too that after getting the receipt in full he at once quit trading at plaintiff's place, although he had been buying from plaintiff continuously for five or six years prior thereto. The statements which he made from time to time that he "would look the matter up" are hardly the statements of one who had made full payment.

We realize that an appellate court is at a great disadvantage in passing upon a matter of this kind. The opportunities of the trial judge for getting to the truth of such a matter are far superior to those of an appellate tribunal. Upon the whole record we are unable, we think, to say that the finding of the trial judge, who saw those witnesses, is against the manifest weight of the evidence, and the judgment is therefore affirmed.

AFFIRMED.

McNurlin, P. J., and Dever, J., concur.

81 - 27554

MARY W. MULCAHY,
Appellee,

vs.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

227 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Trustees of the Police Pension Fund of the City of Chicago from an order entered upon the petition of Mary W. Mulcahy, directing that a writ of mandamus issue requiring the trustees to pay to her arrears of pension found to be due, and to also pay to her thereafter a pension equal to one-half the amount appropriated to the office of police patrolman in the City of Chicago, not, however, exceeding the statutory limitation. The facts are in most respects practically undisputed.

The petitioner is the surviving wife of William H. Mulcahy, to whom she was married more than two months prior to his death on February 19, 1913. William H. Mulcahy was appointed a police operator in the City of Chicago May 14, 1890, and held the position continuously until the time of his death. He faithfully performed the duties of his office, and no charges were ever preferred against him. January 22, 1903, he took the oath of office of a probation sub-operator police patrolman, which oath was in effect that he would support the Constitution of the United States, "and that I will faithfully discharge the duties of the office of such police patrolman according to the best of my ability."

When the police pension fund act went into effect

MARY W. MULCAHY,
Appellee,

vs.

BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF CHICAGO,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE MACSURRY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Trustees of the Police Pension Fund of the City of Chicago from an order entered upon the petition of Mary W. Mulcahy, directing that a writ of mandamus issue requiring the trustees to pay to her arrears of pension found to be due, and to also pay to her thereafter a pension equal to one-half the amount appropriated to the office of police patrolman in the City of Chicago, not, however, exceeding the statutory limitation. The facts are in most respects practically undisputed.

The petitioner is the surviving wife of William H. Mulcahy, to whom she was married more than two months prior to his death on February 10, 1912. William H. Mulcahy was appointed a police operator in the City of Chicago May 14, 1890, and held the position continuously until the time of his death. He faithfully performed the duties of his office, and no charges were ever preferred against him. January 22, 1902, he took the oath of office of a probation sub-operator police patrolman, which oath was in effect that he would support the Constitution of the United States, "and that I will faithfully discharge the duties of the office of such police patrolman according to the best of my ability."

When the police pension fund went into effect

Mulcahy offered and tendered to the trustees the percentage of his salary provided by the Act to be paid by those desirous of becoming beneficiaries, but the defendant trustees refused to receive these payments on the ground that "a police operator" was not a policeman within the meaning of the Act. The court, in granting the prayer of the petitioner, deducted, with the petitioner's consent, from the amount of money which she was to receive, the sums which the trustees had refused to accept from her husband.

It was the theory of the defendant in the trial court, and it now contends here, that police operators became eligible to the benefits of the police pension fund only by virtue of the enactment by the City Council of Chicago of an ordinance passed March 18, 1913, which, it is said, cannot affect the status of the petitioner, since her husband died, as already stated, on February 19th, prior to the enactment of the ordinance.

The question raised is not a new one in this court, nor in the Supreme Court, which, reversing a judgment of this court and of the trial court in People v. Foreman, 296 Ill. 487, held that the Police Pension Fund Act of 1887 included every member of the Police force who was duly appointed and sworn in, irrespective of the kind of services performed. The court said:

> "It is quite clear, as we have already seen, that the Act of 1887 included every member of the police force by giving a right to a pension to every person duly appointed and sworn, and who should serve for the specified term upon the regularly constituted police force, regardless of the nature of the services.

In conformity with the law as thus expressed by the Supreme Court, the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

mulcahy offered and tendered to the trustees the percentage of his salary provided by the act to be paid by those desirous of becoming beneficiaries, but the defendant trustees refused to receive these payments on the ground that "a police operator" was not a police man within the meaning of the act. The court, in granting the prayer of the petitioner, decreed, with the petitioner's consent, from the amount of money which she was to receive, the sum which the trustees had refused to accept from her husband.

It was the theory of the defendant in the trial court, and it now contends here, that police operators became eligible to the benefits of the police pension fund only by virtue of the amendment by the city Council of Chicago of an ordinance passed March 18, 1913, which, it is said, cannot affect the status of the petitioner, since her husband died, as already stated, on February 10th, prior to the amendment of the ordinance.

The question raised is not a new one in this court, nor in the Supreme Court, which, reversing a judgment of this court and of the trial court in People v. Foreman, 250 Ill. 487, held that the Police Pension Fund Act of 1887 included every member of the police force who was duly appointed and sworn in, irrespective of the kind of services performed. The court said:

"It is quite clear, as we have already seen, that the act of 1887 included every member of the police force by giving a right to a pension to every person duly appointed and sworn, and who should serve for the specified term upon the regularly constituted police force, regardless of the nature of the services.

In conformity with the law as thus expressed by the Supreme Court, the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

103 - 27577

JOSEFA SIMEK,
Appellee,

vs.

VACLAV NOVY, ANNA NOVY and JOSEPH C. PISHA Individually and as Trustee,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

227 I.A. 603

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree of foreclosure. The case was heard by the chancellor upon exceptions to the master's report, which were overruled and a finding entered that there was due to the plaintiff the sum of $1988.02 with interest from June 28, 1921. In default of payment of this amount the decree directed that the premises be sold. It also found that the interest of J. C. Pisha as trustee in a second trust deed was junior to the lien of complainant.

The defense set up in the answer was that the principal defendants were not indebted to the complainant, although they neither admitted nor denied that they executed the principal and interest notes. The execution of the trust deed was, however, specifically denied. The answer further averred that August 22, 1916, complainant, pursuant to an agreement to that effect, directed one Josef Tuma to pay certain builders who were erecting a building on premises belonging to defendants, the sum of $1500, but that no such sum was ever paid by Tuma, nor by anyone representing the complainant; that this payment was the only consideration for the execution of the notes; that Tuma died insolvent, and that defendants by an arrangement with the complainant filed a claim against his estate, which was allowed as a claim of the seventh class, and that a dividend of $150 thereon had been paid, which defendants brought into court for complainant's benefit.

103 - STATE

JOHNNA BIRNN,
Appellee,

vs.

VADIAV NOVY, ANNA NOVY and
JOSEPH C. PIRNN individually
and as Trustee,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

227 I.A. 603

MR. JUSTICE MACDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree of foreclosure. The case was heard by the chancellor upon exceptions to the master's report, which were overruled and a finding entered that there was due to the plaintiff the sum of $1988.02 with interest from June 22, 1921. In default of payment of this amount the decree directed that the premises be sold. It also found that the interest of J. C. Pirnn as trustee in a second trust deed was junior to the lien of complainant.

The defense set up in the answer was that the principal defendants were not indebted to the complainant, although they neither admitted nor denied that they executed the principal and interest notes. The execution of the trust deed was, however, specifically denied. The answer further averred that August 22, 1916, complainant, pursuant to an agreement to that effect, directed one Joseph Tuma to pay certain builders who were erecting a building on premises belonging to defendants, the sum of $1800, but that no such sum was ever paid by Tuma, nor by anyone representing the complainant; that this payment was the only consideration for the execution of the notes; that Tuma did not involve, and that defendants by an arrangement with the complainant filed a claim against his estate, which was allowed as a claim of the seventh class, and that a dividend of $150 thereon had been paid, which defendants brought into court for complainant's benefit.

The matters argued in appellants' behalf are based upon the second exception to the report of the master. The complaint is that the master found that the trust deed securing the complainant's note was duly acknowledged on August 22, 1916, by Vaclav Novy and Anna Novy, his wife, before Joseph J. Zarobsky, a notary public, whereas, it is said, the evidence shows it was not in fact so acknowledged.

It is also urged that under the evidence a homestead was involved and that, even as between the parties, this homestead could not be released without acknowledgment in due form. Hence it is concluded the later trust deed, executed on June 20, 1919, and which, without dispute, was duly acknowledged, should be preferred as to the homestead.

A copy of the trust deed to Josef Tuma appears in the record, and attached thereto is the certificate of the notary, which under his seal certifies that "Vaclav Novy and Anna Novy, each in their own right and as husband and wife, appeared before me in person on the day named, and acknowledged that they signed, sealed and delivered the instrument as their free and voluntary act." It also includes release and waiver of the right of homestead.

The evidence tends to show the following additional facts. Vaclav Novy was a bricklayer and owned the premises in question, on which he had begun the erection of a building. He desired to obtain a loan thereon to complete this building. Josef Tuma was a banker, with whom at that time Vaclav Novy had an account. Through a brother of Vaclav, one Thomas Novy, negotiations were opened with the complainant, Josefa Simek, for a loan by her of $1500, to be secured by a mortgage on the premises. She agreed to make the loan, and by previous arrangement she and her sister August 22, 1916, accompanied by Vaclav and Thomas Novy, went to Tuma's bank, where the papers were drawn and signed by Vaclav

The matters argued in appellants' behalf are based upon the second exception to the report of the master. The complaint is that the master found that the first deed securing the complainant's note was duly acknowledged on August 22, 1918, by Vaclav Novy and Anna Novy, his wife, before Joseph L. Zarobsky, a notary public, whereas, it is said, the evidence shows it was not in fact so acknowledged.

It is also urged that under the evidence a homestead was involved and that, even as between the parties, this homestead could not be released without acknowledgment in due form. Hence it is concluded the later first deed, executed on June 20, 1919, and which, without dispute, was duly acknowledged, should be preferred as to the homestead.

A copy of the first deed to Josef Zima appears in the record, and attached thereto is the certificate of the notary, which under his seal certifies that "Vaclav Novy and Anna Novy, each in their own right and as husband and wife, appeared before me in person on the day named, and acknowledged that they signed, sealed and delivered the instrument as their free and voluntary act." It also includes release and waiver of the right of homestead.

The evidence tends to show the following additional facts. Vaclav Novy was a bricklayer and owned the premises in question, on which he had begun the erection of a building. He desired to obtain a loan thereon to complete this building. Josef Zima was a banker, with whom at that time Vaclav Novy had an account. Through a brother of Vaclav, one Thomas Novy, negotiations were opened with the complainant, Josefa Zimak, for a loan by her of $1500, to be secured by a mortgage on the premises. The agreed to make the loan, and by previous arrangement she and her sister August 22, 1918, accompanied by Vaclav and Thomas Novy, went to Zima's bank, where the papers were drawn and signed by Vaclav

Novy. At the same time complainant turned over to Tuma $1500 in cash, which was placed to the credit of Vaclav Novy. Anna Novy, wife of Vaclav, was not present at that time, but later she went to the bank alone and signed all the papers, and a few days thereafter the notes were delivered to the complainant.

September 18th following Tuma committed suicide and the bank was closed. Josefa Simek then took the notes to Frank Zajicek & Son, who were engaged in the real estate business, when it was discovered for the first time that the trust deed was missing. A search in the Recorder's office disclosed that it had not been recorded. May 14, 1917, it was found in the possession of the Chicago Title & Trust Co., administrator of the estate of Tuma. It was then delivered to Frank Zajicek, who at once and prior to the execution of the second trust deed placed it on record.

Before his death Tuma had paid to one of the contractors working on the Novy building the sum of $250. Novy filed a claim against the Tuma estate for $1250, being the remainder of the loan. The claim was allowed and a dividend of $150 paid thereon, which defendants tendered complainant in full satisfaction of her mortgage, but which she refused to accept.

The original exhibits have not been certified to this court, and there is nothing in the copies which appear in the record tending to discredit the trust deed.

Vaclav Novy testifies that when he signed the trust deed, "It was pretty empty. I think the note was empty; nothing on the note; wrote something on it, and let me sign it up. It was just a little while. I signed exhibit 12 that time. It had nothing on then. Mr. Tuma, Thomas Novy and Mrs. Simek were there when I signed. Tuma took them. Signed in the back room. I do

Hovy. At the same time complainant turned over to Tuma $1500 in cash, which was placed to the credit of Vaclav Hovy. Anna Hovy, wife of Vaclav, was not present at that time, but later she went to the bank alone and signed all the papers, and a few days thereafter the notes were delivered to the complainant.

September 1894 following Tuma committed suicide and the bank was closed. Joseph Hlavek then took the notes to Frank Zaglock's son, who were engaged in the real estate business, when it was discovered for the first time that the trust deed was missing. A search in the Recorder's office disclosed that it had not been recorded. May 14, 1895, it was found in the possession of the Chicago Title & Trust Co., administrator of the estate of Tuma. It was then delivered to Frank Zaglock, who at once and prior to the execution of the second trust deed placed it on record.

Before his death Tuma had paid to one of the contractors working on the Hovy building the sum of $250. Hovy filed a claim against the Tuma estate for $1500, being the remainder of the loan. The claim was allowed and a dividend of $100 paid thereon, which defendants tendered complainant in full satisfaction of her mortgage, but which she refused to accept.

The original exhibits have not been certified to this court, and there is nothing in the copies which appears in the record tending to discredit the trust deed.

Vaclav Hovy testifies that when he signed the trust deed, "It was pretty empty. I think the note was empty; nothing on the note; wrote something on it, and let me sign it up. It was just a little while. I signed twelve at that time. It had nothing on them. Mr. Tuma, Thomas Hovy and Mr. Hlavek were there when I signed. Tuma took them. Signed in the back room. I do

not know Joseph J. Zarobsky.*** Did not see him on the 22nd of August, 1916." On cross-examination he said, "My name was not on complainant's exhibit 12; no trustee signed on it. Can't say exactly what was in and what was not. About the first 7 inches were in and the bottom with my name on it. Rest was only printed stuff."

Anna Novy testifies that about a week after the time when her husband was there, she went to the bank alone, where she saw Mr. and Mrs. Tuma; that Mr. Tuma called her to the room, and that she signed some papers; that the signatures on the papers are hers, but that the papers were "empty" when she signed; that no one was there; that she does not know Zarobsky; that after Tuma's death the papers were brought to her by Zajicek, and that the signatures only were on them at that time.

Pauline Kordik, sister of complainant, testifies that she, the witness, was at Tuma's August 22, 1916, with her sister and the two Novys; that she saw Zarobsky at Tuma's place at that time, but that she was not in the same room.

Thomas Novy testified for defendant that he was at Tuma's bank at that time; he says,"The only thing I saw was that Mrs. Simek gave Tuma the money. I do not know anything more. I was standing in front; they were writing some papers in the back,but I was not there; I did not see the papers; I know of nothing else that was said there. We stayed about a half hour. I don't know anything else that transpired at Tuma's bank on that occasion."

Joseph J.Zarobsky, who has since by court proceedings changed his name to Profant,testified that he was a son-in-law of Tuma and employed as a clerk in his bank at the time in question; that the trust deed is partly in his writing and partly in Tuma's; that the interest notes are all in his writing,but he had nothing to do with preparing the principal note. He says all of the mortgage in writing above the signature on the trust deed

not know Joseph L. Zarobsky.** Did not see him on the 22nd of August, 1910.* On cross-examination he said, "My name was not on complainant's exhibit 1A; no trustee signed on it. Don't say exactly what was in and what was not. About the first 7 inches were in and the bottom with my name on it. Rest was only printed stuff."

Anna Mory testified that about a week after the time when her husband was there, she went to the bank alone, where she saw Mr. and Mrs. Tuma; that Mr. Tuma called her to the room, and that she signed some papers; that the signature on the papers are here, but that the papers were "empty" when she signed; that no one was there; that she does not know Zarobsky; that after Tuma's death the papers were brought to her by Zaliesk, and that the signatures only were on them at that time.

Pauline Zordik, sister of complainant, testifies that she, the witness, was at Tuma's August 22, 1910, with her sister and the two Morys; that she saw Zarobsky at Tuma's place at that time, but that she was not in the same room.

Thomas Mory testified for defendant that he was at Tuma's bank at that time; he says, "The only thing I saw was that Mrs. Simek gave Tuma the money. I do not know why this was. I was standing in front; they were writing some papers in the bank, but I was not there; I did not see the papers; I know of nothing else that was said there. He stayed about a half hour. I don't know anything also that happened at Tuma's bank on that occasion."

Joseph L. Zarobsky, who has since by court proceedings changed his name to Joseph Zal, testified that he was a son-in-law of Tuma and employed as a clerk in his bank at the time in question; that the usual deed is partly in his writing and partly in Tuma's; that the interest notes are all in his writing, but he was working to do with preparing the principal note. He says all of the mortgage, in writing above the signature on the usual deed

was completely written in before it was signed. He also says that he took the acknowledgment on the 22nd day of August, 1916, by the date in the acknowledgment, and "my name signed to it and seal." He says that he does not remember the circumstances under which the note was made; that he made several sets of notes and trust deeds every week, and that it is pretty hard to remember five years ago. He says: "Don't remember seeing Novy at the bank; wouldn't know his wife by sight; don't recollect seeing her; don't recollect circumstances under which I took acknowledgments; can't recall any part of it; don't remember any of the circumstances of the signing of the trust deed."

Frank Zajieck testified that he saw exhibits 1 to 11 (the notes) when the same were brought to his office October 16, 1916; that the notes were then in the same condition; that when he failed to locate the trust deed he asked the makers to sign new papers, which they refused to do. He then filed in the recorder's office a paper which appears in evidence as defendant's exhibit 1, this being an affidavit of complainant alleging that the Novys had executed a trust deed "not fully written out so that it could be recorded." He says that he does not know why this statement was made in the affidavit; that he used the phraseology perhaps without considering.

We are satisfied the preponderance of the evidence indicates that the statement was not true. The question for the trial court was whether the evidence submitted was sufficient to overcome the certificate of the notary. The question for this court is whether the finding of the chancellor is, in that respect, clearly and manifestly against the weight of the evidence. There is no dispute as to the rule of law to be applied, which, as stated in Kostureka v. Bartkiewicz, 241 Ill. 604, is:

was completely written in before it was signed. He also says that he took the acknowledgment on the 22nd day of August, 1916, by the date in the acknowledgment, and "my name signed to it and seal." He says that he does not remember the circumstances under which the note was made; that he made several sets of notes and trust deeds every week, and that it is pretty hard to remember five years ago. He says: "Don't remember seeing Roy at the bank; wouldn't know his wife by sight; don't recollect seeing her; don't recollect circumstances under which I took acknowledgments; can't recall any part of it; don't remember any of the circumstances of the signing of the trust deed."

Frank Ballock testified that he saw exhibits 1 to 11 (the notes) when the same were brought to his office October 16, 1916; that the notes were then in the same condition; that when he failed to locate the trust deed he asked the makers to sign new papers, which they refused to do. He then filed in the recorder's office a paper which appears in evidence as defendant's exhibit 1, this being an affidavit of complainant alleging that the Roys had executed a trust deed "not fully written out so that it could be recorded." He says: "I do not know why this statement was made in the affidavit; that he used the phraseology perhaps without consulting."

We are satisfied the preponderance of the evidence indicates that the statement was not true. The question for the trial court was whether the evidence submitted was sufficient to overcome the sufficiency of the notary. The question for this court is whether the finding of the chancellor is, in that respect, clearly and manifestly against the weight of the evidence. There is no dispute as to the rule of law to be applied, which, as stated in Kostreva v. Zarnkovich, 261 Ill. 464, 104

"The certificate of the acknowledgment of a deed in the manner provided by law, cannot be overcome by the unsupported testimony of the grantor. While, as between the parties to the deed, such acknowledgment may be impeached for fraud, collusion or imposition, it cannot be otherwise attacked; and the evidence upon such issue of fraud, collusion or imposition must, 'by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent.' Fitzgerald v. Fitzgerald, 100 Ill. 385; Marston v. Brittenham, 76 id. 611; Watson v. Watson, 118 id. 56; Calumet & Chicago Canal & Dock Co. v. Russell, 68 id. 426; Monroe v. Poorman, 62 id. 523; Lickman v. Harding, 65 id. 505; Graham v. Anderson, 42 id. 514; Oliphant v. Liversidge, 142 id. 160. In the cases cited are fully set forth the reasons of public policy which make the rules stated imperative. Under them the certificate of acknowledgment was not successfully impeached."

Appellant has cited a number of cases and we have examined all of them. These cases are, however, in every instance distinguishable on the facts from the instant one. We think the evidence insufficient to impeach the certificate. In the first place, the recitation of the certificate is probable. In the next place, the testimony of the Novys on material points is not, we think, credible. It does not ring true.

Appellants say that the undisputed evidence shows that Mrs. Novy was not present at the execution of the deed, and cite cases which they claim sustain the contention that this fact alone brings the case within an exception to the general rule - Parlin & Orendorff Co. v. Hutson, 198 Ill. 396, and Bouvier v. Sypher, 186 Fed. 644. It is true that the undisputed evidence shows that she was not present on August 22, 1916, but the evidence shows that there was a direction at that time that she should come afterwards, and the evidence shows that she came, and it is undisputed that her genuine signature appears on the notes and on the trust deed. That the notary did not remember the transaction except as his memory was refreshed by the papers, carries little weight in view of the large number of transactions of this kind to which he was a party. The trust deed, as acknowledged, conveyed the right of homestead, if there was any, and the view we have taken of

"The certificate of the acknowledgment of a deed in the manner provided by law, cannot be overcome by the unsupported testimony of the grantor. While, as between the parties to the deed, such acknowledgment may be impeached for fraud, collusion or imposition, it cannot be otherwise attacked; and the evidence upon such issue of fraud, collusion or imposition must, 'by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent.' Kitzenrod v. Kitzenrod, 100 Ill. 385; Martin v. Brittenham, 76 id. 611; Tatem v. Tatem, 118 id. 36; Delmont & Chicago Canal & Dock Co. v. Mussell, 88 id. 429; Monroe v. Foreman, 62 id. 328; Bigham v. Hardin, 85 id. 505; Graham v. Anderson, 43 id. 214; Gilbert v. Haverstick, 142 id. 166. In the cases cited are fully set forth the reasons of public policy which make the rules stated imperative. Under them the certificate of acknowledgment was not successfully impeached."

Appellant has cited a number of cases and we have examined all of them. These cases are, however, in every instance distinguishable on the facts from the instant one. We think the evidence insufficient to impeach the certificate. In the first place, the recitation of the certificate is probable. In the next place, the testimony of the boys on material points is not, we think, credible. It does not ring true.

Appellants say that the undisputed evidence shows that Mrs. Hoyt was not present at the execution of the deed, and cite cases which they claim sustain the contention that this fact alone brings the case within an exception to the general rule - Faxlin v. Grandforff Co. v. Hutson, 198 Ill. 396, and Lowther v. Bruner, 186 Ind. 644. It is true that the undisputed evidence shows that she was not present on August 22, 1910, but the evidence shows that there was a direction at that time that she should come afterwards, and the evidence shows that she came, and it is undisputed that her genuine signature appears on the notes and on the trust deed. That the notary did not remember the transaction except as his memory was refreshed by the papers, carries little weight in view of the large number of transactions of a similar kind to which he was a party. The trust deed, as acknowledged, conveyed the right of possession, if there was any, and the view we have taken of

the evidence makes it unnecessary to discuss the disputed question of whether the Novy family had an estate of homestead in the premises at the time in question.

The decree is affirmed.

AFFIRMED.

McBurely, P. J., and Dever, J., concur.

the evidence makes it unnecessary to answer the disputed question of whether the Navy family had an estate of homestead in the premises at the time in question.

The decree is affirmed.

AFFIRMED.

McGuire, P. J., and Dever, J., concur.

110 - 27584

JOSEPH GRUDZIEN,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET AND SOUTH CHICAGO RAILWAY COMPANY and SOUTHERN STREET RAILWAY COMPANY, doing business as CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment for $937.50, entered upon the verdict of a jury. The declaration alleged that about February 10, 1919, at the intersection of Wells and Oak streets, in the City of Chicago, defendants negligently and carelessly ran one of their cars "at a high rate of speed and without any warning or signal of the approach of its said street car * * * and in consequence thereof then and there caused and permitted its said cars to run into and against the plaintiff's automobile in which the plaintiff was then and there riding," by means whereof the plaintiff's automobile was wrecked and destroyed. Due care on plaintiff's part was also alleged. Defendants pleaded the general issue.

The appellants assign and argue alleged error in the giving of an instruction, and also urge that the verdict is against the manifest weight of the evidence as to defendants' negligence and also as to due care upon the part of the plaintiff.

The undisputed facts in evidence are that Wells street is a public highway extending north and south and Oak street is a public highway extending east and west. Two parallel

110 - 37644

JOSEPH GUDDELL,
appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
CHICAGO CITY RAILWAY COMPANY,
CHICAGO SOUTH SHORE AND SOUTH BEND
RAILWAY COMPANY and CHICAGO
STREET RAILWAY COMPANY,
doing business as CHICAGO
SURFACE LINES,
appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment for $[illegible], entered upon the verdict of a jury. The declaration alleges that about February 16, 1[illegible], at the intersection of [illegible] and Oak streets, in the city of Chicago, defendants negligently and [illegible] in the [illegible] at which time and place [illegible] and will at any [illegible] of the approach of the said street car [illegible] in consequence [illegible] there caused the [illegible] the plaintiff [illegible] and there fell, by means [illegible] and injured. The [illegible] plaintiff [illegible].

The appellants in their [illegible] in the plaintiff or intersection, the [illegible] to exercise the [illegible] negligence and [illegible] in the case upon the part of the plaintiff.

The [illegible] in a public highway attending [illegible] and over street in a public highway attending such [illegible]. The [illegible]

railroad tracks were laid in Wells street by the defendant companies;on the easterly track, northbound cars were operating while southbound cars ran over the west track. Oak street intersects Wells street at right angles and the evidence tends to show that the width of Oak street from curb to curb is about 30 feet; about 300 feet south of Oak street and parallel with it runs Whiting street. At the time of the accident a saloon stood on the southeast corner of Oak and Wells streets, on the northeast corner a dry goods store, and on the northwest corner a drug store. The accident occurred between twelve and one o'clock at the noon hour on February 11, 1919. The plaintiff at that time was driving a six passenger Cadillac automobile in a westerly direction on the north side of Oak street and across its intersection with Wells, when his automobile was struck by a northbound car and the automobile practically demolished.

It is the contention of plaintiff that the accident was due to the negligence of defendants in running their street car without warning across the intersection at an excessive rate of speed, which witnesses testify was from twenty-five to thirty miles per hour. The evidence on this point is conflicting, and while the defendants argue that a preponderance of the evidence indicates that the car was not moved at the excessive rate of speed, but on the contrary with due caution, we are not disposed to set aside the verdict of the jury on that ground, although we are inclined to think that a preponderance of the evidence indicates that the bell was rung as the northbound car proceeded to cross the intersection, and that the speed of the car was not so excessive as plaintiff contends. We think this is apparent from the distance which the street car ran after the collision.

The controlling question in the case is whether the finding of the jury that the plaintiff was in the exercise of due

railroad tracks were laid in Walla street by the defendant companies; on the easterly track, northbound cars were operating while southbound cars ran over the west track. Oak street intersects Walla street at right angles and the evidence tends to show that the width of Oak street from curb to curb is about 30 feet; about 300 feet south of Oak street and parallel with it runs Whitney street. At the time of the accident a saloon stood on the southeast corner of Oak and Walla streets, on the northeast corner a dry goods store, and on the northwest corner a drug store. The accident occurred between twelve and one o'clock at the noon hour on February 11, 1919. The plaintiff at that time was driving a six passenger Cadillac automobile in a westerly direction on the north side of Oak street and across its intersection with Walla, when his automobile was struck by a northbound car and the automobile practically demolished.

It is the contention of plaintiff that the accident was due to the negligence of defendants in running their street car without warning across the intersection at an excessive rate of speed, which witnesses testify was from twenty-five to thirty miles per hour. The evidence on this point is conflicting, and while the defendants argue that a preponderance of the evidence indicates that the car was not moved at the excessive rate of speed, but on the contrary with due caution, we are not disposed to set aside the verdict of the jury on that ground, although we are inclined to think that a preponderance of the evidence indicates that the bell was rung as the northbound car proceeded to cross the intersection, and that the speed of the car was not so excessive as plaintiff contends. We think this is apparent from the distance which the street car ran after the collision.

The controlling question in the case is whether the finding of the jury that the plaintiff was in the exercise of due

care, which the verdict indicates it must have found, is against the manifest preponderance of the evidence. It therefore becomes necessary to examine the evidence bearing on the care exercised by plaintiff at and just prior to the occasion in question. McCarthy, plaintiff's first witness, says that he, the witness, was standing at 171 Oak street, about thirty feet east of Wells; that he saw the street car 50 feet down Wells street, and that the automobile was then probably 10 feet east of the tracks, and that the automobile was then moving west at a speed of twelve or fifteen miles an hour. Lutz, another witness, who says he was standing in front of the drug store, testifies that he saw plaintiff's automobile going west at a speed of about eight miles an hour; that the machine slowed down to the street car track; that the street car did not slacken up speed at any time; that it came through at a speed of about twenty-five miles; that when the witness first saw the automobile, it was about two doors east of the corner of Wells street, and the street car at that time was about the middle of the block between White and Oak streets; that the automobile was running about eight miles an hour and slowed up "when he came to the car track and he slowed up, and he started to cross the track." The witness further says that the street car kept going ahead at full speed. Zucker, another witness for plaintiff, says that he was driving a Ford truck, following the street car; that it was going 25 to 27 miles per hour; that the street car slacked up just when he had the machine right in front of him. The view which this witness had of the accident was obstructed by the street car. He says that when he first saw the man driving the automobile, plaintiff was on the street driving the machineand slowed down and then kept on going west; that he slowed down and then tried to cross. The witness could not say how fast, about eight, and then he slowed down, and then shot ahead; that when he slowed down, he

case, which the verdict indicates it must have found, is against the manifest preponderance of the evidence. It therefore becomes necessary to examine the evidence bearing on the care exercised by plaintiff at and just prior to the occasion in question.

McCarthy, plaintiff's first witness, says that he, the witness, was standing at 171 Oak street, about thirty feet east of Wells; that he saw the street car 50 feet down Wells street, and that the automobile was then probably 10 feet east of the tracks, and that the automobile was then moving west at a speed of twelve or fifteen miles an hour. Lutz, another witness, who says he was standing in front of the drug store, testifies that he saw plaintiff's automobile going west at a speed of about eight miles an hour; that the machine slowed down to the street car track; that the street car did not slacken up speed at any time; that it came through at a speed of about twenty-five miles; that when the witness first saw the automobile, it was about two doors east of the corner of Wells street, and the street car at that time was about the middle of the block between White and Oak streets; that the automobile was running about eight miles an hour and slowed up "when he came to the car track and he slowed up, and he started to cross the track." The witness further says that the street car kept going ahead at full speed. Moyer, another witness for plaintiff, says that he was driving a Ford truck, following the street car; that it was going 25 to 27 miles per hour; that the street car slacked up just when he had the machine right in front of him. The view which this witness had of the accident was obstructed by the street car. He says that when he first saw the man driving the automobile, plaintiff was on the street driving the machine and slowed down and then kept on going west; that he slowed down and then tried to cross. The witness could not say how fast, about eight, and then he slowed down, and then shot ahead; that when he slowed down, he

was nearly with the buildings, and the street car was then half or a quarter of a block back. "The automobile at that time, had only to run about 20 feet to get on the track, and he went right along until he got across the track, and towards the north side of Oak street, so that he could see the motorman and the motorman could see him, nothing between them." Edward Diederich, testifies that he was standing at the southwest corner of Oak and Wells street, and that the automobile was crossing Wells street, crossing the tracks at a speed of eight miles an hour; that the street car approached at a speed of thirty miles per hour; that he slackened up just a trifle when five feet away from the machine. Guy Casper, who was assisting the witness McCarthy with the truck, says that McCarthy was on the truck, and that he, the witness, was taking furniture out of it; that when the driver of the automobile crossed Wells street, he slowed up a little bit, and then went over; that the street car did not at any time slow up before it hit the automobile, but ran the same as it did before. He says that the automobile on Oak street was going about twenty-two miles an hour, and that the driver slowed up when he was about fifteen feet from the car track "then he started faster, he started up about the same as he slacked up;" that he was not running any faster on the track than when he slowed up. Charles P. Sweetman, who was riding in the automobile with a lady friend, (Miss Nelson) says that the speed of the automobile as they were crossing the tracks was about eight miles an hour; that he did not see the street car until they were hit; that was the first thing he knew about the accident, and he was unconscious after it. He says that he noticed they slacked up just before they came to the street car track, and that plaintiff drove a moderate speed in Oak street about fifteen or eighteen or twenty miles; that when about ten feet from the car track, he had the car in second speed, about eight miles an hour. The plaintiff testified that as he came to

was nearly with the buildings, and the street car was then half or a quarter of a block back. "The automobile at that time, had only to run about 20 feet to get on the track, and he went right along until he got across the track, and toward the north side of Oak street, so that he could see the motorman and the motorman could see him, nothing between them." Edward Diederich, testifies that he was standing at the southwest corner of Oak and Wells street, and that the automobile was crossing Wells street, crossing the tracks at a speed of eight miles an hour; that the street car approached at a speed of thirty miles per hour; that he slackened up just a trifle when five feet away from the machine. Guy Cooper, who was assisting the witness McCarthy with the truck, says that McCarthy was on the truck, and that he, the witness, was taking furniture out of it; that when the driver of the automobile crossed Wells street, he slowed up a little bit, and then went over; that the street car did not at any time slow up before it hit the automobile, but ran the same as it did before. He says that the automobile on Oak street was going about twenty-two miles an hour, and that the driver slowed up when he was about fifteen feet from the car track "then he started faster, he started up about the same as he slacked up;" that he was not running any faster on the track than when he slowed up. Charles F. Sweetman, who was riding in the automobile with a lady friend, (Miss Nelson) says that the speed of the automobile as they were crossing the tracks was about eight miles an hour; that he did not see the street car until they were hit; that was the first thing he knew about the accident, and he was unconscious after it. He says that he noticed they slacked up just before they came to the street car track, and that plaintiff drove a moderate speed in Oak street about fifteen or eighteen or twenty miles; that when about ten feet from the car track, he had the car in second speed, about eight miles an hour. The plaintiff testified that as he came to

Wells street he was driving about eighteen miles an hour, and that he slacked up, and that as he came to the street car he started up; that as he came to Wells street he saw the street car coming along; that it was on the other side of the post, about 50 or 60 feet away. He says, "I stopped my car before I went on the track, I stopped it about 15 feet from the car track, and I saw the street car coming, it was as far from me, about 50 or 60 feet away. I stopped." Asked why he did not stop when he saw the car coming along he replied: "When I reached the street car track the street car was about fifty feet away from me. I do not know for sure how long my automobile was, about 18 feet, but I did not measure it, I don't know' I heard the bell ringing, but the car was too far away from me yet." These witnesses were all called by the plaintiff.

We think on any theory of the case under the evidence submitted in his own behalf, the plaintiff was guilty of contributory negligence, as a matter of fact. The accident happened at about noon, the street was clear of traffic, plaintiff could see the street car coming several hundred feet away. He could have avoided the accident either by increasing his speed or by waiting until the street car passed by. Although he was the first to enter the intersection, this did not give him, necessarily the right of way, nor excuse him from the exercise of due care. He admits that he saw the street car coming, and his own evidence and that of his witnesses fail to disclose any circumstances which would prevent him from giving his undivided attention to the matter of making a safe passage of the crossing. There is only one fact in the case which would possibly have a tendency to excuse his conduct. There is evidence tending to show that as the street car approached Oak street, a lady, apparently a prospective

walk street he was driving about eighteen miles an hour, and that he slacked up, and that as he came to the street car he started up; that as he came to Wells street he saw the street car coming along; that it was on the other side of the post, about 50 or 60 feet away. He says, "I stopped my car before I went on the track, I stopped it about 15 feet from the car track, and I saw the street car coming, it was as far from me, about 50 or 60 feet away. I stopped." Asked why he did not stop when he saw the car coming along he replied: "When I reached the street car track the street car was about fifty feet away from me. I do not know for sure how long my automobile was, about 15 feet, but I did not measure it, I don't know. I heard the bell ringing, but the car was too far away from me yet." These witnesses were all called by the plaintiff.

We think on any theory of the case under the evidence submitted in his own behalf, the plaintiff was guilty of contributory negligence, as a matter of fact. The accident happened at about noon, the street was clear of traffic, plaintiff could see the street car coming several hundred feet away. He could have avoided the accident either by increasing his speed or by waiting until the street car passed by. Although he was the first to enter the intersection, this did not give him, because of the right of way, nor excuse him from the exercise of due care. He could, if he saw the street car coming, and his own evidence was that of his wife, was full to disclose any circumstances which could prevent his from giving his undivided attention to the matter of making a safe passage of the crossing. There is only one fact in the case which would possibly have a tendency to excuse his conduct. There is evidence tending to show that as the street car approached Oak street, a long, comparatively a [illegible]

passenger, held up her hands to indicate her desire that the car stop. But when asked on cross-examination if he had started across because he thought the car would stop for the lady, his counsel objected, and the objection was sustained by the court. The occupants of the automobile were not seriously injured, and the evidence shows that both sides at once began diligently to gather the names of witnesses. The lady who held up her hand was not produced, however, nor was Miss Nelson, the young lady riding in the automobile, who (the evidence for defendant tended to show) at the time of the accident severely criticised plaintiff for his carelessness. The absence of these witnesses was not accounted for by plaintiff.

The judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely, P. J., and Dever, J., concur.

passenger, held up her hands to indicate her desire that the car stop. But when asked on cross-examination if he had started across because he thought the car would stop for the lady, his counsel objected, and the objection was sustained by the court. The occupants of the automobile were not seriously injured, and the evidence shows that both sides at once began diligently to gather the names of witnesses. The lady who held up her hand was not produced, however, nor was Miss Nelson, the young lady riding in the automobile, who (the evidence for defendant tended to show) at the time of the accident severely criticised plaintiff for his carelessness. The absence of these witnesses was not accounted for by plaintiff.

The judgment will be reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

McGuerly, P. J., and Dever, J., concur.

110 - 27584

FINDING OF FACT.

We find as a fact that the plaintiff was guilty of negligence at the time and place of the accident in question, proximately tending to bring about the injury stated in plaintiff's declaration.

110 - 27284

FINDING OF FACT.

We find as a fact that the plaintiff was guilty of negligence at the time and place of the accident in question, proximately tending to bring about the injury stated in plaintiff's declaration.

146 - 27622

HARRY DUNNILL,
Appellee,

vs.

THE CO-OPERATIVE SOCIETY
OF AMERICA et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case, the plaintiff, who is appellee in this court, filed an amended statement of claim in which he alleged that on October 21, 1920, at the special instance and request of the defendants' duly authorized agent, he subscribed and paid to the defendants the sum of $110 for a certificate evidencing two shares of stock in defendants' business, which certificate was to be delivered within a reasonable time; that although often demanded, defendants had refused and neglected to deliver the same, whereby they had become indebted to him for the money so advanced. The case was tried by the court without a jury. At the close of plaintiff's evidence and again at the close of all the evidence, the defendants made a motion for a finding in their favor, which was denied. The court made a finding in favor of the plaintiff and entered judgment thereon. It is argued here that the court erred in these rulings, and appellants ask this court to reverse the judgment with a finding in their favor.

The evidence tends to show that appellants are trustees of the Co-operative Society of America, an express trust under the common law, created by an agreement and declaration of trust dated February 20, 1919, and recorded in the Recorder's Office of Cook County. Interests in this trust were represented by certain certificates issued by the defendant trustees. The

146 - 27622

HENRY DUNNILL,
Appellee,

vs.

THE CO-OPERATIVE SOCIETY
OF AMERICA et al.,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In this case, the plaintiff, who is appellee in this court, filed an amended statement of claim in which he alleged that on October 21, 1920, at the special instance and request of the defendants' duly authorized agent, he subscribed and paid to the defendants the sum of $110 for a certificate evidencing two shares of stock in defendants' business, which certificate was to be delivered within a reasonable time; that although often demanded, defendants had refused and neglected to deliver the same, whereby they had become indebted to him for the money so advanced. The case was tried by the court without a jury. At the close of plaintiff's evidence and again at the close of all the evidence, the defendants made a motion for a finding in their favor, which was denied. The court made a finding in favor of the plaintiff and entered judgment thereon. It is argued here that the court erred in these rulings, and appellants ask this court to reverse the judgment with a finding in their favor.

The evidence tends to show that appellants are trustees of the Co-operative Society of America, an express trust under the common law, created by an agreement and declaration of trust dated February 20, 1919, and recorded in the Recorder's Office of Cook County. Interests in this trust were represented by certain certificates issued by the defendant trustees. The

Great Western Security Company was a brokerage concern, and the defendants had a contract with it whereby it was to sell beneficial interests in this trust. The brokerage concern in carrying out the terms of this contract employed an agent named Lund, whose authority to act for the defendants under the terms of the contract is not disputed.

October 21, 1920, Lund sold to plaintiff two shares in this trust for $110, which sum was paid in cash. Lund, as he was authorized to do, received the payment and issued a receipt in the usual form. With other things it stated that the subscription was received subject to rejection by the trustees, and that if it was not accepted for any reason, the payment made should be promptly returned. December 1st thereafter defendant wrote plaintiff asking him to inform them whether he had had any dealings with "Mr. Peter Lund," and stated that any information would be treated as strictly confidential. December 5, 1920, plaintiff replied, giving information as to the purchase of his own and other shares by members of his family. In this letter he said, "If there is anything wrong with the transaction, please let me know at once so I may take the necessary steps to protect myself." Plaintiff did not receive a reply to this request. He then in February, 1921, got Mr. Giersch, as he says, to go and see these people. Giersch testified that he called up the offices of defendants about February 1, 1921; that he went to their main office and told them his business and presented the receipts. He was told they could not do anything for him unless he left the receipts there. He says he told them he had been sent to find out whether they were going to issue the certificate; that he was finally referred to Mr. Shea, who told him that he was pretty busy, but that plaintiff would get the certificate in a week or ten days. He says that he called again at plaintiff's request, about the 1st of March, 1921, and

Great Western Security Company was a brokerage concern, and the defendants had a contract with it whereby it was to sell beneficial interests in this trust. The brokerage concern in carrying out the terms of this contract employed an agent named Lund, whose authority to act for the defendants under the terms of the contract is not disputed.

October 21, 1920, Lund sold to plaintiff two shares in this trust for $112, which sum was paid in cash. Lund, as he was authorized to do, received the payment and issued a receipt in the usual form. With other things it stated that the subscription was received subject to rejection by the trustees, and that if it was not accepted for any reason, the payment made should be promptly returned. December 1st thereafter defendant wrote plaintiff asking him to inform them whether he had had any dealings with "Mr. Peter Lund," and stated that any information would be treated as strictly confidential. December 3, 1920, plaintiff replied, giving information as to the purchase of his own and other shares by members of his family. In this letter he said, "If there is anything wrong with the transaction, please let me know at once so I may take the necessary steps to protect myself." Plaintiff did not receive a reply to this request. Then in February, 1921, got Mr. Gleason, as he says, to go and see these people. Gleason testified that he called up the offices of defendants about February 1, 1921; that he went to their main office and told them his business and presented the receipt. He was told they could not do anything for him unless he left the receipt there. He says he told them he had been sent to find out whether they were going to issue the certificate; that he was finally referred to Mr. Shaw, who told him that he was pretty busy, but that plaintiff would get the certificate in a week or ten days. He says that he called again at plaintiff's request, about the 1st of March, 1921, and

again saw Shea, and was told by Shea to tell plaintiff not to worry, that he would get the certificates as soon as possible, in a week or ten days. The witness says that about April 1st thereafter he again called upon Mr. Shea upon the same errand; that he told Shea plaintiff desired him to send either the certificates or the money, to which Shea replied that he had been a little busy, but that he would send then out in a week or ten days, and said, "We will give him the certificates."

Plaintiff then employed an attorney, who on May 6th wrote the defendants, insisting on a return of plaintiff's money. May 11th this attorney again wrote at length, to the effect that if he did not hear from them he would be compelled to resort to other means. May 14th defendants replied to the letter of May 6th that the writer was investigating the subscriptions, "and we will let you hear from us as soon as possible." May 23rd defendants again wrote: "Mr. Robinson has informed me about the conversations with you regarding subscriptions of Harry, Burt and Selma Dunnill, and states that due to the action of one crooked member of our organization, they have lost confidence in our business. This matter has been put through for the issuing of certificates, and I believe your clients will realize the wisdom of retaining same, and we are making no change in this arrangement." June 15th thereafter defendants delivered the certificates by registered mail with a dividend check, both of which were returned by plaintiff's attorney in a letter dated July 7th.

The question to be decided is whether the plaintiff has a right to recover the purchase money. No definite time was named in the contract for the delivery of the certificates, and the law would therefore imply a promise that the same would be delivered within a reasonable time. The defendants contend that

again saw Shea, and was told by Shea to tell plaintiff not to worry that he would get the certificates as soon as possibly, in a week or ten days. The witness says that about April 1st thereafter he again called upon Mr. Shea upon the same errand; that he told Shea plaintiff desired him to send either the certificates or the money, to which Shea replied that he had been a little busy, but that he would send them out in a week or ten days, and said, "We will give him the certificates."

Plaintiff then employed an attorney, who on May 6th wrote the defendants, insisting on a return of plaintiff's money. May 11th this attorney again wrote at length, to the effect that if he did not hear from them he would be compelled to resort to other means. May 14th defendants replied to the letter of May 6th that the writer was investigating the subscriptions, "and we will let you hear from us as soon as possible." May 23rd defendants again wrote: "Mr. Robinson has informed me about the conversations with you regarding subscriptions of Harry, Burt and Selma Dunnill, and states that due to the action of one crooked member of our organization, they have lost confidence in our business. This matter has been put through for the issuing of certificates, and I believe your clients will realize the wisdom of retaining same, and we are making no change in this arrangement." June 15th thereafter defendants delivered the certificates by registered mail with a dividend check, both of which were returned by plaintiff's attorney in a letter dated July 7th.

The question to be decided is whether the plaintiff has a right to recover the purchase money. No definite time was named in the contract for the delivery of the certificates, and the law would therefore imply a promise that the same would be delivered within a reasonable time. The defendants contend that

under the circumstances the delivery was within a reasonable time. There was testimony which the defendants contend would excuse deferred delivery. This testimony was given by Kessler, attorney for the defendant Society, and his evidence is not contradicted. He says that his connection with the matter commenced in November, 1920, and that at that time he received word from Fox Lake that Lund had taken subscriptions and failed to turn in the money; that Mr. Lund had been employed by an organizer, Mr. Shea; that the witness called Shea in and told him to investigate the matter, which he did, and defendants' letters to plaintiff followed; that when he received plaintiff's letter on December 5th, "Mr. Shea came in to me about it, and we heard, I believe, that was all the transaction on which Lund had collected money. * * * I investigated and checked up, and tried to find Peter Lund and was unable to do it; he had skipped, and that subscription was not reported to the office until April, 1921." The witness further says that he explained to the attorney for the plaintiff that there was delay in issuing the certificate due to the fact that the defendants had increased the par value of their stock, and that they were substituting a new form of certificate for the older ones, and that it would necessitate sending out about 20,000 certificates, and that would slow up the current business, and that it took from the 1st of April until the first part of June until the certificates were sent out.

We do not think the facts testified to would excuse the delay in view of the undisputed evidence that defendants had full knowledge of plaintiff's rights on December 5, 1920. We do not hesitate to say that the delay was unreasonable. Appellants cite Beaunisne v. Scholz, 182 Ill. App. 338, but that case is not at all like this one on the material facts.

under the circumstances the delivery was within a reasonable time. There was testimony which the defendants contend would excuse deferred delivery. This testimony was given by Koesler, attorney for the defendant society, and his evidence is not contradicted. He says that his connection with the matter commenced in November, 1920, and that at that time he received word from Fox Lake that Lund had taken subscriptions and failed to turn in the money; that Mr. Lund had been employed by an organizer, Mr. Shoe; that the witness called Shoe in and told him to investigate the matter, which he did, and defendants' letters to plaintiff followed; that when he received plaintiff's letter on December 5th, "Mr. Shoe came in to me about it, and we heard, I believe, that was all the transaction on which Lund had collected money. * * * I investigated and checked up, and tried to find Peter Lund and was unable to do it; he had skipped, and that subscription was not reported to the office until April, 1921." The witness further says that he explained to the attorney for the plaintiff that there was delay in issuing the certificate due to the fact that the defendants had increased the par value of their stock, and that they were substituting a new form of certificate for the older one, and that it would necessitate working out about 20,000 certificates, and that would slow up the current business, and that it took from the 1st of April until the first part of June until the certificates were sent out.

We do not think the facts testified to would excuse the delay in view of the undisputed evidence that defendants had full knowledge of plaintiff's rights on December 5, 1920. We do not hesitate to say that the delay was unreasonable. Appellants cite Pennsylvania v. Quinlan, 182 Ill. App. 326, but that case is not at all like this one on the material facts.

Appellants argue, citing authorities, that plaintiff's rights and status as a stockholder were in no way interfered with by reason of the delay in delivering the certificate; that the certificate was only evidence of the property right, which had already in fact been conveyed. Majors v. Girdner, 159 Pac. 826; Gallatin County Farmers Alliance v. Flannery, 197 Pac. 996. These cases hold that this is the rule with reference to the subscriptions to the capital stock of a corporation. But there are many facts in each of the cases cited distinguishing them from this case. The rights of the parties here are controlled by the written contract and, we think, according to its terms the plaintiff was not to take an interest in the trust until the certificate should be issued. Defendants had the right to refuse to accept the subscription within a reasonable time. Not having done so, the plaintiff, according to elementary principles, had the right to withdraw his offer and demand the return of the money paid. While the case of Kinzer v. Cowie, 235 Ill. 383, is in many respects different upon the facts, the opinion there lays down rules which we regard as applicable and controlling here.

The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

Appellants argue, citing authorities, that plaintiff's rights and status as a stockholder were in no way interfered with by reason of the delay in delivering the certificate; that the certificate was only evidence of the property right, which had already in fact been conveyed. Malone v. Gardner, 188 Pac. 824; Gallatin County Farmers Alliance v. Flannery, 187 Pac. 996. These cases hold that this rule is the with reference to the subscriptions to the capital stock of a corporation. But there are many facts in each of the cases cited distinguishing them from this case. The rights of the parties here are controlled by the written contract and, we think, according to its terms the plaintiff was not to take an interest in the trust until the certificate should be issued. Defendants had the right to refuse to accept the subscription within a reasonable time. Not having done so, the plaintiff, according to elementary principles, had the right to withdraw his offer and demand the return of the money paid. While the case of Kinzer v. Dowie, 235 Ill. 388, is in many respects different upon the facts, the opinion there lays down rules which we regard as applicable and controlling here.

The judgment will be affirmed.

AFFIRMED.

McBurney, P. J., and Dever, J., concur.

178 - 27654

RELIABLE STORE FIXTURE COMPANY, a Corporation,
Appellee,

vs.

ELLA WILLARD, Doing Business Under the Name of Masonic Temple Lunch,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 604

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $90, entered upon the verdict of a jury. The claim of plaintiff was based upon a written contract made April 20, 1921, whereby plaintiff agreed to supply to defendant "One combination buffet, with silver display case, to be built out of birchwood or whitewood, white enamelled as per drawing, to be O. K.'d by you. Terms, $380.00, $100.00 with order, $100.00 C. O. D. Balance in six payments of $30 per month." The evidence shows that the buffet was made pursuant to a drawing O. K.'d by the defendant, was delivered to her, and that she paid upon the purchase price thereof the sum of $200.

The defense was that the article delivered was not manufactured according to the details provided for in the contract and directions of the plaintiff. The balance claimed was $180; the amount allowed by the jury was only $90. Appellant argues that it is apparent that there was a breach of the contract by plaintiff, and that plaintiff therefore could not recover at all in the suit upon the contract. It is apparent that appellant has misapprehended the law applicable to the facts appearing in the record. The transaction was a sale by description of a specific article to be manufactured for the plaintiff, and upon a breach of the warranty (which from the verdict

178 - 27554

KELLAMIK STORE FIXTURE COMPANY, a Corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
ZILA WILLARD, Doing Business Under the Name of Masonic Temple Lunch, Appellant.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $80, entered upon the verdict of a jury. The claim of plaintiff was based upon a written contract made April 20, 1921, whereby plaintiff agreed to supply to defendant "One combination buffet, with silver display case, to be built out of birchwood or whitewood, white enamelled as per drawing, to be O. K.'d by you. Terms, $380.00, $100.00 with order, $100.00 C. O. D. Balance in six payments of $30 per month." The evidence shows that the buffet was made pursuant to a drawing O. K.'d by the defendant, was delivered to her, and that she paid upon the purchase price thereof the sum of $200.

The defense was that the article delivered was not manufactured according to the details provided for in the contract and directions of the plaintiff. The balance claimed was $180; the amount allowed by the jury was only $80. Appellant argues that it is apparent that there was a breach of the contract by plaintiff, and that plaintiff therefore could not recover at all in the suit upon the contract. It is apparent that appellant has misapprehended the law applicable to the facts appearing in the record. The transaction was a sale by description of a specific article to be manufactured for the plaintiff, and upon a breach of the warranty (which from the verdict

of the jury we must presume there was), the rights of the parties were determined by section 69 of the Uniform Sales Act, Cahill's Revised Statutes 1921, p. 3048.

Upon the delivery of the article the defendant was put to her election. She could rescind the sale, return the article to the vendor and sue for the return of the purchase money, or she might retain the goods and, when sued, recoup the difference between the value of the article contracted for and the value of the article which was in fact delivered. Plaintiff chose to keep the article, and when sued recoup. She cannot maintain inconsistent positions. Healy Ice Machine Co. v. Clow & Son, 148 Ill. App. 421; Allen v. Henn, 197 Ill. 486; Williston on Sales, section 604.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

of the jury we must presume there was), the rights of the parties were determined by section 69 of the Uniform Sales Act, Gahill's Revised Statutes 1921, p. 3048.

Upon the delivery of the article the defendant was put to her election. She could rescind the sale, return the article to the vendor and sue for the return of the purchase money, or she might retain the goods and, when sued, recoup the difference between the value of the article contracted for and the value of the article which was in fact delivered. Plaintiff chose to keep the article, and when sued recoup. She cannot maintain inconsistent positions. Nealy Ice Machine Co. v. Glow & Son, 148 Ill. App. 421; Allen v. Henn, 197 Ill. 488; Williston on Sales, section 604.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Dever, J., concur.

Petition denied

366 - 27324

WILLIAM T. BRUECKMER et al.,
Appellees,

vs.

SAMPSON CASH,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 604[3]

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a verdict for possession of premises in an action of forcible detainer brought in the name of the successors in trust to the trustees of the estate of Wm. H. Godair, deceased, against the defendant under a lease dated May 9, 1916, purporting to be an indenture by and between "The estate of Wm. H. Godair, deceased, by its agents E. E. Baldwin & Co." as parties of the first part, and said defendant, party of the second part. It was signed by defendant and in the name of said estate by said agents. While the instrument was informally executed, nevertheless the defendant entered into and took possession of the premises under it and paid rent according to its terms until December 19, 1918, since which time he has paid no rent. He was in possession when the suit was instituted, and on May 19, 1921, when he was served with a five days notice in the name of said trustees, at which time he owed, according to the terms of the lease, $1180. Defendant offered no evidence, and the court gave an instructed verdict for the plaintiff.

The complaint names the plaintiffs as successors in trust to the trustees of said estate, as did also the five days notice. It is appellant's contention that the proof did not show the relationship of landlord and tenant between said

successors in trust and defendant. While there was no direct proof that they were such successors, yet the point is not raised by any specific objection. On the other hand, it is clear that defendant undertook to deal with the trustees of said estate in entering into the lease and acquired his tenancy through agents acting for them, and the evidence tends to show that the same agents continued to act for them and their alleged successors in collecting the rent from defendant. Defendant's contentions, therefore, may be summarized as an attempt to question his landlord's title, which, of course, he cannot do.

Accordingly the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

successors in trust and defendant. While there was no direct proof that they were such successors, yet the point is not raised by any specific objection. On the other hand, it is clear that defendant undertook to deal with the trustees of said estate in entering into the lease and requested his tenancy through agents acting for them, and the evidence tends to show that the same agents continued to act for them and their alleged successors in collecting the rent from defendant. Defendant's contentions, therefore, may be summarized as an attempt to question his landlord's title, which, of course, he cannot do.

Accordingly the judgment will be affirmed.

JERSEY.

Kirkhill and Grigley, JJ., concur.

132 - 27606

JOSEPH HOLLINS et al.,
Appellants,

vs.

ROBERT DORTCH.

RANDALL H. McGAROCK, Intervening Petitioner,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

287 I.A. 604

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an attachment suit in which an alleged transferee of the property attached interpleaded, claiming ownership thereof. The issue of ownership was tried without a jury and from the court's finding against plaintiffs they have appealed, and urge that the finding was not warranted by the evidence. We need not discuss the evidence, for as appellants failed to prove that the relation of creditor and debtor existed between them and the defendant in the attachment they were in no position to question the good faith of the transfer under which appellee claimed title. Nor could they rely on the attachment affidavit and bond or other papers in the case to supply such proof. (Springer v. Bigford, 160 Ill. 495; Yost Mfg. Co. v. Alton, 168 id. 564; Campbell & Zell Co. v. Ross, 187 id. 553.)

Accordingly the court's order will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

132 - 27866

JOHNSON MOLLING et al., Appellants,	
vs.	APPEAL FROM APPELLATE COURT
ROBERT NORTON,	IN CHICAGO.
RAMDALL R. McCLOCKY, Intervening Petitioner, Appellee.	

MR. PRESIDING JUSTICE HARRIS

DELIVERED THE OPINION OF THE COURT.

This is an attachment suit in which an alleged transferee of the property attached intervened, claiming ownership thereof. The issue of ownership was tried without a jury and from the court's finding against plaintiffs they have appealed, and urge that the finding was not warranted by the evidence. We need not discuss the evidence, for as appellants failed to prove that the relation of creditor and debtor existed between them and the defendant in the attachment they were in no position to question the good faith of the transfer under which appellee claimed title. Nor could they rely on the attachment affidavit and bond or other papers in the case to supply such proof. (Mendelsohn v. Meyers, 160 Ill. 495; Yost Mfg. Co. v. Allen, 168 Ill. 306; Campbell & Hall Co. v. Hone, 197 Ill. 223.)

Accordingly the court's order will be affirmed.

Affirmed.

Morrill and Graham, JJ., concur.

198 - 27674

HUGRO MANUFACTURING COMPANY,
a Corporation,
Appellee,

vs.

ADOLPH STURM COMPANY, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 605

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This suit was brought September 30, 1920, to recover $2,936.40, a balance claimed to be due for dowels sold and delivered by plaintiff to defendant in October and November, 1920.

The record shows the following proceedings in the case, all in the year 1920: October 10, entry of defendant's appearance; October 18, filing of its affidavit of merits; November 21, striking of same pursuant to motion and due notice thereof, and leave given to file an amended affidavit in five days; November 29, order defaulting defendant for want of affidavit of merits or defense, and for judgment; November 30, order assessing damages in the sum of $2436.40; December 2, order overruling defendant's motions to vacate default and judgment, for leave to file amended affidavit of merits, and to strike plaintiff's counter affidavits, from which appeal was allowed.

In support of the motions so overruled were three affidavits, one by each of defendant's attorneys Laramie and Linaweaver, and one by Adolph Sturm, defendant's president. Laramie's was to the effect that after filing the affidavit of merits on October 18, an agreement was entered into between plaintiff and defendant for a dismissal of the suit, the terms of which are not set forth in the affidavit, that the suit was

188 - 27074

HUGHO MANUFACTURING COMPANY,
a Corporation,
Appellee,

vs.

ACOLITE STORE COMPANY, a
Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

28 I.A. 605

MR. PRESIDING JUSTICE MATHES
DELIVERED THE OPINION OF THE COURT.

This suit was brought September 30, 1930, to recover $2,038.40, a balance claimed to be due for dobola rolls and delivered by plaintiff to defendant in October and November, 1930.

The record shows the following proceedings in the case, all in the year 1930: October 10, entry of defendant's appearance; October 16, filing of its affidavit of merits; November 21, striking of same pursuant to motion and due notice thereof, and leave given to file an amended affidavit in five days; November 28, order defaulting defendant for want of affidavit of merits or defense, and for judgment; November 30, order assessing damages in the sum of $2038.40; December 2, order overruling defendant's motions to vacate default and judgment, for leave to file amended affidavit of merits, and to strike plaintiff's counter affidavits, from which appeal was allowed.

In support of the motions so overruled were three affidavits, one by each of defendant's attorneys Zarnow and Dinsmoor, and one by Alvin Shaw, defendant's president. Dinsmoor's was to the effect that after filing the affidavit of merits on October 16, no agreement was made by the parties between plaintiff and defendant for a dismissal of the suit, the terms of which are not set forth in the affidavit; that the suit was

not dismissed, that he was surprised in view of the agreement to receive notice of the motion to strike the affidavit of merits on November 21, that "during that period" he was "negotiating with plaintiff's attorneys for payment of one installment under said new agreement," and that plaintiff's attorney told him that nothing further would be done without notice to him, and that relying thereon he was absent from the city November 29, when the case appeared on the trial call of the court. Lina-weaver's affidavit was to the effect that he appeared in court November 29 to look after the motion for default in Laramie's absence, and that he told the court he had just come into the case. The amended affidavit of merits sworn to by said Sturm, which defendant requested leave to file and which was offered in support of said motions, set forth the agreement presumably referred to in Laramie's affidavit as shown by correspondence between the attorneys for the respective parties, and stated what was done under it. The agreement as so shown consisted of an offer by defendant addressed to plaintiff's attorney October 19, to pay $500 by an enclosed check "on account," with the understanding that the balance as claimed by plaintiff should be paid in three equal installments, 30, 60 and 90 days thereafter. Acknowledging the same on October 20, plaintiff's attorneys agreed to return said check unless plaintiff agreed to the plan of extended payments of the balance amounting to $2446.15 in three equal installments as proposed. The check was paid and applied, but the installment falling due November 19 was not paid, which was presumably the one that Laramie was "negotiating" about before steps were taken for default, and presumably negotiations for a further extension failed and plaintiff proceeded as above stated because defendant did not keep its agreement.

not dismissed, that he was surprised in view of the agreement to receive notice of the motion to strike the affidavit of merits on November 21, that "during that period" he was "negotiating with plaintiff's attorneys for payment of one installment under said new agreement," and that plaintiff's attorney told him that nothing further would be done without notice to him, and that relying thereon he was absent from the city November 23, when the case appeared on the trial call of the court. Illaweaver's affidavit was to the effect that he appeared in court November 23 to look after the motion for default in Lazowie's absence, and that he told the court he had just come into the case. The amended affidavit of merits sworn to by said Stern, which defendant requested leave to file and which was offered in support of said motions, set forth the agreement previously referred to in Lazowie's affidavit as shown by correspondence between the attorneys for the respective parties, and stated what was done under it. The agreement as so shown contained an offer by defendant addressed to plaintiff's attorney October 12, to pay $500 by an endorsed check "on account," with the understanding that the balance as claimed by plaintiff should be paid in three equal installments, 7, 60 and 90 days thereafter. Acknowledging the same on October 2, plaintiff's attorneys agreed to return such check unless plaintiff agreed to the plan of extended payments of the balance amounting to $644.10 in three equal installments as proposed. The check was paid and applied, but the installment falling due November 12 was not paid, which was presumably the one that Lazowie was "negotiating" about before steps were taken for default, and presumably negotiations for a further extension failed and plaintiff proceeded as above stated because defendant did not keep its agreement.

The defenses set forth in the affidavit of merits, so offered and rejected, were predicated upon the delivery of defective goods, (notwithstanding defendant had made two payments on account of $250 each, the last payment six months after delivery of the goods) and upon a claim of ultra vires in making the sales, (of which, nevertheless, defendant got the benefit) and upon the agreement to accept the terms of the adjustment (which defendant breached) and to give due notice of taking a default against defendant.

It clearly appears, therefore, from Laramie's affidavit and said amended affidavit of merits that defendant had not lived up to its agreement upon which it claims the case was to be dismissed. It does not appear that any arrangement was made for an extension of time for the payment of said first installment, with respect to which defendant was in default before any motion was made to take a default against him in the case. Nor does it appear that plaintiff was to dismiss the suit before the installments were paid. Defendant having breached its agreement was not in a position to insist on plaintiff's carrying out its part by dismissal of the suit or further extension of time granted, as no steps were taken to have defendant's affidavit of merits stricken until after such breach, and defendant even then took no steps to file an amended affidavit of merits for which the time had not expired, and during which Laramie was negotiating without success for a further extension of time to pay the first installment. As defendant received due notice of taking a default and judgment and neglected without legal excuse or due diligence to take the ordinary steps to protect his right to make a defense, we think the court was justified in considering the proffered affidavit of merits as lacking in the elements of

The defenses set forth in the affidavit of merits, so offered and rejected, were predicated upon the delivery of defective goods, (notwithstanding defendant had made two payments on account of $250 each, the last payment six months after delivery of the goods) and upon a claim of mutual rights in making the sales, (of which, nevertheless, defendant got the benefit) and upon the agreement to accept the terms of the adjustment (which defendant breached) and to give due notice of taking a default against defendant.

It clearly appears, therefore, from Lamunia's affidavit and said amended affidavit of merits that defendant had not lived up to its agreement upon which it claims the case was to be dismissed. It does not appear that any arrangement was made for an extension of time for the payment of said first installment, with respect to which defendant was in default before any motion was made to take a default against him in the case. Nor does it appear that plaintiff was to wait for the last before the installments were paid. Defendant having breached its agreement was not in a position to insist on plaintiff's carrying out its part by dismissal of the suit or further extension of time granted, as no steps were taken to have filed a affidavit of merits stricken until after such breach, and returning even then took no steps to file an amended affidavit of merits for which the time had not expired, and during which time it was negotiating without success for a further extension of time to pay the first installment. As defendant received the benefits of taking a trial and judgment and negotiated without any excuse or the diligence to take the ordinary steps to protect his right to make a defense, we think the court was justified in considering the proffered affidavit of merits as lacking in the elements of

sincerity and good faith. We also think the affidavits in support of the defendant's motions were insufficient and that there is no abuse of discretion in denying the motions.

The judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

sincerity and good faith. We also think the affidavits in support of the defendant's motions were insufficient and that there is no shade of discretion in denying the motions.

The judgment will be affirmed.

AFFIRMED.

Morrill and Grigsby, JJ., concur.

(27070)

207 - 27683

JAMES COAL CO., a Corporation,
Appellee,

vs.

LUCY C. CATHERWOOD,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

227 I.A. 605

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover the price of coal sold and delivered by plaintiff to defendant. The amount claimed is $1900.94. In defence defendant claimed a shortage in the delivery and a failure to deliver the kind of coal plaintiff agreed and warranted to deliver, and that, therefore, defendant was entitled to recoup $1527 damages for breach of warranty. Judgment was thereupon rendered for the difference of $373, and as to the amount in dispute the case went to the jury, which rendered a verdict for $1527.94 in plaintiff's favor. From the judgment thereon this appeal was taken.

The contract was an oral one entered into between the president of the plaintiff and the husband of the defendant as her agent. The contract was for the delivery of Pocahontas Mine Run Coal to be delivered in certain quantities at certain apartment buildings owned by defendant. There was no material dispute as to what the contract was except as to the terms of payment and the time it was entered into.

The first point for reversal argued is that the court erred in withdrawing from consideration of the jury the issue as to whether the coal was of the kind or quality sold, and the issue as to the time of payment. Appellant's counsel meets

207 - 37683

KING COAL CO., a Corporation, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT
LUCIUS. CATHERWOOD, Appellant.	OF CHICAGO.

MR. PRESIDING JUSTICE MCGOOY

DELIVERED THE OPINION OF THE COURT:

This is a suit to recover the price of coal sold and delivered by plaintiff to defendant. The amount claimed is $1000.94. In intervening defendant claimed a shortage in the delivery and a failure to deliver the kind of coal plaintiff agreed and warranted to deliver, and that, therefore, defendant was entitled to recoup $1027 damages for breach of warranty. Judgment was thereupon rendered for the difference of $27, and on the amount in dispute [illegible] the case [illegible], which rendered a verdict for $1027.94 in plaintiff's favor. From the judgment thereon this appeal was taken.

The contract was [illegible] reduced into writing the president of [illegible] plaintiff and the husband of the defendant as her agent. The contract was for the delivery of Kanawha Nine Run Coal to be delivered in carload quantities at various apartment buildings owned by defendant. There [illegible] no material dispute as to what the contract was except as [illegible] terms of payment and the kind [illegible] was delivered.

The first point for reversal urged is that the court erred in withdrawing from consideration of [illegible] the issue as to whether the coal was of the kind or quality sold, and the issue as to the time of delivery. Appellant's [illegible] works

these points by discussing the weight of the evidence on the subject. Of course, it is fundamental that if there is any evidence tending to establish the issue of the case it should be submitted to the jury regardless of its weight, which is for the jury and not for the court to determine. As there was evidence by one of defendant's witnesses to the effect that the coal delivered at defendant's buildings was not Pocahontas Mine Run Coal the court erred in withdrawing the issue from the jury as to the quality of the coal by instructing them that they were not concerned with it, and that it was insufficient to warrant submitting it to them.

Appellee contends that defendant accepted the coal and that as her janitors receiving the same had the opportunity to inspect it she waived the right to object to payment. But where the contract is executory, like this, the claim for damages on account of the breach of warranty will survive the acceptance of the property. (See Underwood v. Wolf, 131 Ill. 425, and cases there reviewed.)

Objection is made to the introduction of certain tickets for deliveries of coal to defendant, some of which were receipted for by her janitors. Each of these tickets had written on it: "P. M. R.," meaning Pocahontas Mine Run Coal. They were received in evidence to show that the coal delivered was coal of that kind or quality. We think their competency for such purpose would depend on whether defendant's janitors had authority to reject the coal. If not, and defendant's attention was not called to them, we think they were incompetent evidence as to the kind or quality of coal and amounted to a mere declaration by the plaintiff in its own behalf.

Appellant also urges that it was error for the court to refuse certain so-called "acceptances," which were mailed by

these points by discussing the weight of the evidence on the subject. Of course, it is fundamental that if there is any evidence tending to establish the issue of the case it should be submitted to the jury regardless of its weight, which is for the jury and not for the court to determine. An injury was claimed by one of defendant's witnesses to the effect that the coal delivered at defendant's building was not "screened." Also the court erred in withdrawing the issue from the jury [illegible] the quality of the coal by instructing them that they were not concerned with it, and that it was immaterial to warrant rescinding it to trial.

Appellee contends that defendant accepted the coal and thereon bar further rescinding the sale for the opportunity to inspect it and waived the right to object to payment. Yet where the contract is executory, like this, the right [illegible] to inspect of the buyer or owner by will waiving the [illegible] property. (See Lightwood v. Bell, [illegible] . 420, and cases there reviewed.)

Reference is made to the introduction of certain letters and instructions of [illegible] were received in evidence [illegible] delivered [illegible] would depend on whether [illegible] reject the coal. In [illegible] defendant's [illegible] to them, as claim [illegible] or reality of [illegible] plaintiff in the [illegible].

Appellant also urges [illegible] to refuse certain [illegible] by

plaintiff to defendant, purporting to acknowledge the receipt of a verbal order for a certain amount of "Poca. M. R. Coal." These written acceptances contained conditions that do not appear to have been discussed at the time of entering into the oral contract, which, according to the testimony of defendant's president, was entered into five days before the mailing of such acceptances. There is nothing in plaintiff's evidence to indicate that the contract was not complete at that time or that there was an arrangement for a written confirmation of the same. While defendant contended, and plaintiff denied, that defendant's husband, who entered into the contract for her, informed plaintiff that such acceptances were not in accordance with the contract already entered into, yet without other evidence on the subject we think these acceptances were not properly admissible in evidence.

In view of these conclusions it is unnecessary to discuss other points raised on this appeal. Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Morrill and Gridley, JJ., concur.

plaintiff to defendant, purporting to acknowledge the receipt of a verbal order for a certain amount of "Poon. E. K. Oval."

These written acceptances contained conditions that do not appear to have been discussed at the time of entering into the oral contract, which, according to the testimony of defendant's president, was entered into five days before the mailing of such acceptances. There is nothing in plaintiff's evidence to indicate that the contract was not complete at that time or that there was an arrangement for a written confirmation of the same. While defendant contended, and plaintiff denied, that defendant's husband, who entered into the contract for her, informed plaintiff that such acceptances were not in accordance with the contract already entered into, yet without other evidence on the subject we think these acceptances were not properly admissible in evidence.

In view of these conclusions it is unnecessary to discuss other points raised on this appeal. Accordingly the judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Morrill and Grimley, JJ., concur.

55 - 27002

HILDA PALMER,
Plaintiff in Error,

vs.

JAMES PERCY STRICKLAND,
Administrator of estate of
RUFUS K. TABOR, deceased, and
MULLEN BREWING COMPANY, a
corporation,
Defendants in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 303

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On March 25, 1909, plaintiff commenced a fourth class tort action in the Municipal Court of Chicago against the City of Chicago, R. K. Tabor and the Mullen Brewing Company, a corporation, to recover damages for personal injuries alleged to have been sustained by her on the evening of September 21, 1907, by falling into a hole in the sidewalk on the north side of 63rd street, just west of Sangamon street, in the City of Chicago. Plaintiff further alleged that at the time of the accident R. K. Tabor was the owner of the property, in front of which was the sidewalk in question, and that the Mullen Brewing Company was in possession of said property as lessee of Tabor. On May 17, 1916, the death of Tabor was suggested, and James Percy Strickland, administrator of Tabor's estate, was substituted as one of the defendants. On April 3, 1918, on plaintiff's motion, the case was dismissed as to the defendant, City of Chicago. On June 8, 1918, the court entered judgment "on the verdict herein" against the plaintiff for costs, and she was allowed 60 days within which to file a bill of exceptions. On September 23, 1918, more than 60 days after the entry of said judgment, the judge who had tried the case signed the bill of exceptions or stenographic report and ordered that it be filed as a part of the record, and it was so

55 - 27002

HILDA PARKER, Plaintiff in Error,	
vs.	MINOR TO MUNICIPAL COURT OF CHICAGO.
JAMES PERCY STRICKLAND, Administrator of estate of RUFUS K. TABOR, deceased, and MULLEN BREWING COMPANY, a corporation, Defendants in Error.	

MR. JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

On March 25, 1909, plaintiff commenced a fourth class tort action in the Municipal Court of Chicago against the City of Chicago, R. K. Tabor and the Mullen Brewing Company, a corporation, to recover damages for personal injuries alleged to have been sustained by her on the evening of September 23, 1907, by falling into a hole in the sidewalk on the north side of 63rd street, just west of Sangamon street, in the City of Chicago. Plaintiff further alleged that at the time of the accident R. K. Tabor was the owner of the property, in front of which was the sidewalk in question, and that the Mullen Brewing Company was in possession of said property as lessee of Tabor. On May 17, 1910, the death of Tabor was suggested, and James Percy Strickland, administrator of Tabor's estate, was substituted as one of the defendants. On April 3, 1912, on plaintiff's motion, the case was dismissed as to the defendant, City of Chicago. On June 8, 1912, the court entered judgment "on the verdict herein" against the plaintiff for costs, and she was allowed 60 days within which to file a bill of exceptions. On September 24, 1912, more than 60 days after the entry of said judgment, the judge who had tried the case signed the bill of exceptions or stenographic report and ordered that it be filed as a part of the record, and it was so

filed.

On June 3, 1921, the present writ of error was sued out from this appellate court, returnable to the October, 1921, term. On December 6, 1921, the cause was continued for service to the March, 1922, term. On April 28, 1922, the motion of the defendant in error, Mullen Brewing Company, to strike said stenographic report from the transcript was allowed, and its further motion to affirm the judgment was reserved to the hearing. On June 6, 1922, the motion of plaintiff in error to vacate and set aside said order of April 28, 1922, was denied.

It appears from the stenographic report that on August 7, 1918, the 60th day after the entry of the judgment, plaintiff's attorney presented said report to the Honorable Harry Olson, Chief Justice of said Municipal Court, and he wrote thereon above his signature the following:

> "In the absence of Judge Harry P. Dolan, who tried the within entitled cause, from the City of Chicago, this stenographic report was presented to me this 7th day of August, 1918, the attorneys for Strickland, adm'r., and Mullen Brew. Co. being present."

It further appears that under date of September 23, 1918, (47 days after the time for filing said report had expired) the said judge who had tried the cause, Harry P. Dolan, certified over his signature that the foregoing was a full, true and correct stenographic report of all proceedings had before him on the trial, that final judgment was rendered on June 8, 1918, and that "this report was presented to me for signing upon my return to judicial duties after my vacation period, during which I was absent from the City of Chicago, and held by me for examination until September 21, 1918, on which day, after notice to the parties, it was signed and directed to be filed as a part of the record of said cause."

filed.

On June 3, 1921, the present writ of error was sued out from this appellate court, returnable to the October, 1921, term. On December 6, 1921, the cause was continued for service to the March, 1922, term. On April 28, 1922, the motion of the defendant in error, Mullen Brewing Company, to strike said stenographic report from the transcript was allowed, and its further motion to affirm the judgment was reserved to the hearing. On June 6, 1922, the motion of plaintiff in error to vacate and set aside said order of April 28, 1922, was denied.

It appears from the stenographic report that on August 7, 1919, the 60th day after the entry of the judgment, plaintiff's attorney presented said report to the Honorable Harry Olson, Chief Justice of said Municipal Court, and he wrote thereon above his signature the following:

> "In the absence of Judge Harry P. Olson, who tried the within entitled cause, from the City of Chicago, this stenographic report was presented to me this 7th day of August, 1919, the attorney for Litchfield, admr., and Mullen Brew. Co. being present."

It further appears that under date of September 25, 1919, (47 days after the time for filing said report had expired) the said judge who had tried the cause, Harry P. Olson, certified over his signature that the foregoing was a full, true and correct stenographic report of all proceedings had before him on the trial, that final judgment was rendered on June 3, 1919, and that "this report was presented to me for signing upon my return to judicial duties after my vacation period, during which I was absent from the City of Chicago, and held by me for examination until September 21, 1919, on which day, after notice to the parties, it was signed and directed to be filed as a part of the record of said cause."

It does not appear why Judge Dolan, who tried the case, was absent from Chicago, and none of the reasons mentioned in the Statute (Sec. 81 Practice Act) excusing the presentation of the stenographic report to such trial judge are shown. Such stenographic report, not being signed by the trial judge within the time required, is not properly in the record, (People v. Rosenwald, 266 Ill. 548; Thomlinson Riley Company v. Feinberg & Kahn, 220 Ill. App. 442), and we find nothing that can be construed as a waiver or as estopping defendant in error from moving in this court that said stenographic report be stricken.

We have examined the common law record, and find no error therein. Furthermore, no ground for a reversal of the judgment, based upon that record, is here urged.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

It does not appear why Judge Dolan, who tried the case, was absent from Chicago, and none of the reasons mentioned in the statute (Sec. 81 Practice Act) excusing the presentation of the stenographic report to such trial judge are shown. Such stenographic report, not being signed by the trial judge within the time required, is not properly in the record. (People v. Rosenwald, 264 Ill. 548; Thomlinson Bilsy Company v. Zeinberg & Kahn, 280 Ill. App. 442), and we find nothing that can be construed as a waiver or as estopping defendant in error from moving in this court that said stenographic report be stricken.

We have examined the common law record, and find no error therein. Furthermore, no ground for a reversal of the judgment, based upon that record, is here urged.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Morrill, J., concur.

27090

114 - 27588

CHARLES HAGEMAN,
Appellee,

vs.

HARRY H. CAVIN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 305 4

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse a judgment for $305.20 rendered after verdict against defendant by the Municipal Court of Chicago on October 15, 1921, in a fourth class tort action for property damage to plaintiff's automobile, alleged to have been occasioned by defendant's negligence.

The accident happened on August 24, 1919. On that day plaintiff was driving his five-passenger Dodge car in a southerly direction on the west side of Western avenue, a north and south street, near 110th street, in the City of Chicago. About 25 feet in front of plaintiff's car there was a Ford truck, also moving in a southerly direction. On the east side of Western avenue defendant was driving his Apperson car in a northerly direction, and moving at a moderate rate of speed. Suddenly, and apparently without any warning, the driver of the Ford truck, to avoid hitting a motorcycle then on the west side of the street, turned the truck to the east and collided with defendant's Apperson car with such force that its steering gear was broken. Plaintiff, observing this collision, stopped his Dodge car. Almost instantly thereafter defendant's Apperson car, its steering gear being broken, crossed, or was thrown across, the street in a northwesterly direction and collided with plaintiff's Dodge car, causing

114 - 27488

CHARLES HADEMAN,
Appellee.

vs.

HARRY H. DAVIS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE CHIDNEY DELIVERED THE OPINION OF THE COURT.

It is sought by this appeal to reverse a judgment for $202.20 rendered after verdict against defendant by the Municipal Court of Chicago on October 15, 1921, in a fourth class tort action for property damage to plaintiff's automobile, alleged to have been occasioned by defendant's negligence.

The accident happened on August 24, 1919. On that day plaintiff was driving his five-passenger Dodge car in a southerly direction on the west side of Western avenue, a north and south street, near 120th street, in the City of Chicago. About 25 feet in front of plaintiff's car there was a Ford truck, also moving in a southerly direction. On the east side of Western avenue defendant was driving his Apperson car in a northerly direction, and moving at a moderate rate of speed. Suddenly, and apparently without any warning, the driver of the Ford truck, to avoid hitting a motorcycle then on the west side of the street, turned the truck to the east and collided with defendant's Apperson car with such force that its steering gear was broken. Plaintiff, observing this collision, stopped his Dodge car. Almost instantly thereafter defendant's Apperson car, its steering gear being broken, crossed, or was thrown across, the street in a northwesterly direction and collided with plaintiff's Dodge car, causing

the damage thereto for which plaintiff sued. Western avenue at the place of the accident was "a kind of a country road," approximately about 15 feet wide.

The principal ground urged by counsel for defendant for a reversal of the judgment is that there is no evidence showing that defendant was guilty of any negligence proximately causing the damage to plaintiff's automobile. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict in his favor, but the motions were denied. After examining the testimony in the present record, we are of the opinion that there is no evidence showing that defendant was guilty of any negligence which proximately caused the damage complained of. "Where there is any evidence fairly tending to show the negligence charged was the proximate cause of the injury that question is one of fact for the jury, but whether there is any such evidence is a question of law, which is raised by motion for a directed verdict." (Jenkins v. LaSalle County Coal Co., 264 Ill. 238, 240.) The judgment must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Barnes, P. J., and Morrill, J., concur.

the damage thereto for which plaintiff sued. Western avenue at the place of the accident was "a kind of a country road," approximately about 15 feet wide.

The principal ground urged by counsel for defendant for a reversal of the judgment is that there is no evidence showing that defendant was guilty of any negligence proximately causing the damage to plaintiff's automobile. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendant moved for a directed verdict in his favor, but the motions were denied. After examining the testimony in the present record, we are of the opinion that there is no evidence showing that defendant was guilty of any negligence which proximately caused the damage complained of. Where there is any evidence fairly tending to show the negligence charged was the proximate cause of the injury that question is one of fact for the jury, but whether there is any such evidence is a question of law, which is raised by motion for a directed verdict." (Jenkins v. Danville County Coal Co., 364 Ill. 238, 240.) The judgment must be reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

Barnes, P. J., and Morrill, J., concur.

114 - 27588

FINDING OF FACT.

We find as an ultimate fact that at and before the time of the accident in question the defendant, Harry H. Cavin, was not guilty of any negligence proximately causing the damage to plaintiff's automobile.

114 - 27255

FINDING OF FACT.

We find as an ultimate fact that at and before the time of the accident in question the defendant, Harry H. Davis, was not guilty of any negligence proximately causing the damage to plaintiff's automobile.

185 - 27661

HARRY M. ENGLESTEIN and LOUIS ENGLESTEIN, copartners doing business as HARRY M. and LOUIS ENGLESTEIN,
Appellees,

vs.

JAMES P. MONAHAN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 605

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $769, rendered against him by the Municipal Court of Chicago on September 26, 1921, in a fourth class action tried before the court without a jury, in which plaintiffs sought to recover certain commissions as real estate brokers.

It is alleged in plaintiff's statement of claim, in substance, that prior to July 31, 1918, the parties entered into a verbal agreement by which defendant listed with plaintiffs certain premises in the City of Chicago for leasing, and agreed to pay to plaintiffs the "usual and customary commissions charged by real estate brokers for consummating leases;" that on July 31, 1918, through the instrumentality of plaintiffs, a lease was negotiated and consummated between defendant and Frank Shepera and Christopher Buckles upon the premises for ten years at the aggregate rental of $48,300 for the term; and that plaintiffs thereby earned as commissions the sum of $819, which are the usual and customary charges made by real estate brokers for the services rendered.

The defendant in his affidavit of merits denied that he had agreed to pay to plaintiffs the usual and customary commissions charged by brokers for consummating leases, and set up as defenses, in substance, (1) that Shepera, prior to

MARKY M. SHOLKOVSKIN and
LOUIS SHOLKOVSKIN, copartners
doing business as MARKY M.
and LOUIS SHOLKOVSKIN,
Appellees,

vs.

JAMES P. MORAHAN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DONLEY DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for $750, rendered against him by the Municipal Court of Chicago on September 30, 1921, in a fourth class action tried before the court without a jury, in which plaintiffs sought to recover certain commissions as real estate brokers.

It is alleged in plaintiff's statement of claim, in substance, that prior to July 31, 1919, the parties entered into a verbal agreement by which defendant listed with plaintiffs certain premises in the City of Chicago for leasing, and agreed to pay to plaintiffs the "usual and customary commissions charged by real estate brokers for consummating leases;" that on July 31, 1919, through the instrumentality of plaintiffs, a lease was negotiated and consummated between defendant and Frank Meyers and Christopher Mahlon upon the premises for ten years at the aggregate rental of $46,500 for the term; and that plaintiffs thereby earned an commissions the sum of $919, which are the usual and customary charges made by real estate brokers for the services rendered.

The defendant in his affidavit of merits denied that he had agreed to pay to plaintiffs the usual and customary commissions charged by brokers for consummating leases, and set up as defenses, in substance, (1) that Meyers, prior to

and at the time the lease was negotiated, was financially worthless, of which fact plaintiffs had knowledge yet failed to so advise defendant, and that defendant, had he so been advised, would not have executed the lease; and (2) that, had plaintiffs not been guilty of "fraudulent suppression of the fact of Shepera's irresponsibility," and had Shepera and Buckles taken possession of the premises and paid rent under the lease, plaintiff would have been entitled to a commission of not exceeding 2-1/2 per cent of the rent collected, by virtue of a verbal agreement made by plaintiffs and defendant about June 1, 1918, to the effect that plaintiffs would endeavor to obtain tenants for the premises and collect the rents thereof for a commission of 2-1/2 per cent of the rents collected.

On the trial, the employment of plaintiffs by defendant to negotiate a lease of the premises, and defendant's signing of a ten year lease to Shepera and Buckles, was admitted. The dispute concerned the terms of the verbal contract of employment as to commissions. Plaintiffs, who were licensed real estate brokers, tried their case on the theory that defendant made an express verbal contract with them whereby he agreed, in case they negotiated a lease of the premises to parties acceptable to him, to pay them the "usual and customary commissions" charged by real estate brokers for consummating leases; that they presented Shepera and Buckles as prospective tenants and that after full investigation defendant accepted them as tenants and executed the ten year lease to them; and that thereby they had earned as commissions the sum of $819, less a credit of $50 to which defendant was entitled. Harry M. Englestein, a member of the plaintiff firm, testified on direct examination, in substance, that he told defendant that in case plaintiffs succeeded in securing a tenant for the premises they

and at the time the lease was negotiated, was financially worthless, of which fact plaintiffs had knowledge yet failed to so advise defendant, and that defendant, had he so been advised, would not have executed the lease; and (2) that, had plaintiffs not been guilty of "fraudulent suppression of the fact of Shepere's irresponsibility," and had Shepere and Buckles taken possession of the premises and paid rent under the lease, plaintiff would have been entitled to a commission of not exceeding 2-1/2 per cent of the rent collected, by virtue of a verbal agreement made by plaintiffs and defendant about June 1, 1919, to the effect that plaintiffs would endeavor to obtain tenants for the premises and collect the rents thereof for a commission of 2-1/2 per cent of the rents collected.

On the trial, the employment of plaintiffs by defendant to negotiate a lease of the premises, and defendant's signing of a ten year lease to Shepere and Buckles, was admitted. The dispute concerned the terms of the verbal contract of employment as to commissions. Plaintiffs, who were licensed real estate brokers, rested their case on the theory that defendant made an express verbal contract with them whereby he agreed, in case they negotiated a lease of the premises to parties acceptable to him, to pay them the "usual and customary commissions" charged by real estate brokers for consummating leases; that they procured Shepere and Buckles as prospective tenants and that after full investigation defendant accepted them as tenants and executed the ten year lease to them; and that thereby they had earned a commission the sum of $312, less a credit of $50 to which defendant was entitled. Harry H. Hughesten, a member of the plaintiff firm, testified on direct examination, in substance, that he said defendant that in case plaintiffs succeeded in securing a tenant for the premises they

would expect defendants to pay them the usual "board rate commission;" that the "board" rates for the renting of property such as defendant's in the year 1918 was 5% of the rental for the first two years of the lease and 1% of the rental for every year thereafter, which under the lease in question amounted to $819; and that the "Cook County Real Estate Board" rates were "the usual and customary rates" during said year. On cross-examination the witness testified that during said year there were two real estate boards in the city of Chicago - the "Cook County Real Estate Board" and the "Chicago Real Estate Board;" that when a person speaks of the "Board" it is understood in common parlance to mean the "Chicago Real Estate Board;" that he is a member of the "Cook County Real Estate Board;" that during the year 1918 he received a printed notification from the last mentioned Board giving rates of commission, purporting to be its authorized rates; and that his testimony, as to what were the rates of the last mentioned Board during said year, was based entirely upon said printed notification. Plaintiffs did not show what were the rates of the "Chicago Real Estate Board" during said year, and introduced no further testimony as to what were the usual and customary commissions charged by real estate brokers for consummating leases. The defendant testified that Englestein never said that plaintiffs would charge him the usual "board rate commission;" that he (defendant) never told Englestein that he would pay such commission; and that he did not know what was meant by the term "board commission."

Upon a review of the evidence, we fail to find sufficient proof that any express verbal contract was made whereby defendant agreed, in case plaintiffs negotiated a lease to parties acceptable to him, to pay them the usual

would expect defendants to pay them the usual "board rate commission;" that the "board" rates for the renting of property such as defendant's in the year 1919 was 5% of the rental for the first two years of the lease and 1% of the rental for every year thereafter, which under the lease in question amounted to $819; and that the "Cook County Real Estate Board" rates were "the usual and customary rates" during said year. On cross-examination the witness testified that during said year there were two real estate boards in the city of Chicago - the "Cook County Real Estate Board" and the "Chicago Real Estate Board;" that when a person speaks of the "Board" it is understood in common parlance to mean the "Chicago Real Estate Board;" that he is a member of the "Cook County Real Estate Board;" that during the year 1919 he received a printed notification from the last mentioned Board giving rates of commission, purporting to be its authorized rates; and that his testimony, as to what were the rates of the last mentioned Board during said year, was based entirely upon said printed notification. Plaintiffs did not show what were the rates of the "Chicago Real Estate Board" during said year, and introduced no further testimony as to what were the usual and customary commissions charged by real estate brokers for consummating leases. The defendant testified that Englestein never said that plaintiff would charge him the usual "board rate commission;" that he (defendant) never told Englestein that he would pay such commission; and that he did not know what was meant by the term "board commission."

Upon a review of the evidence, we fail to find sufficient proof that any express verbal contract was made whereby defendant agreed, in case plaintiff negotiated a lease to pertain acceptable to him, to pay them the usual

and customary commissions charged by brokers for consummating leases. We are satisfied, however, that defendant impliedly agreed, in case a lease acceptable to him was negotiated, to pay to plaintiffs the usual and customary commissions. But, for the reason that plaintiffs did not sufficiently establish by competent evidence what those usual and customary commissions were, we are of the opinion that the judgment should be reversed and the cause remanded for a new trial. We think that defendant failed to establish, by a preponderance of the evidence, his two special defenses contained in his affidavit of merits above referred to.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Morrill, J., concur.

and customary commissions charged by brokers for consummating leases. We are satisfied, however, that defendant impliedly agreed, in case a lease acceptable to him was negotiated, to pay to plaintiffs the usual and customary commissions. But, for the reason that plaintiffs did not sufficiently establish by competent evidence what those usual and customary commissions were, we are of the opinion that the judgment should be reversed and the cause remanded for a new trial. We think that defendant failed to establish, by a preponderance of the evidence, his two special defenses contained in his affidavit of merits above referred to.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Burrill, J., concur.

213 - 27689

LENA FISHMAN,
Appellee,

vs.

SAMUEL J. ROSENTHAL,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 606

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer commenced in the Municipal Court of Chicago on October 13, 1921. There was a jury trial and at the conclusion of all the evidence the court instructed the jury to return a verdict finding the defendant, Rosenthal, guilty of unlawfully witholding from the plaintiff the possession of the premises described in the complaint, viz, the third apartment at No. 3130 Palmer Square in the City of Chicago, and that the right to the possession thereof is in the plaintiff. The jury returned such a verdict and on November 7, 1921, judgment was entered on the verdict and it was ordered that a writ of restitution issue. The defendant appealed.

The undisputed facts are in substance as follows: On August 3, 1920, a written lease of the premises was executed by the then owner, Leo Greenburg, to the defendant, commencing October 1, 1920, and expiring September 30, 1921, at a monthly rental of $80 payable in advance at the office of the lessor's agents, F. E. Lackowski & Co., Chicago. On July 20, 1921, said Lackowski & Co. wrote defendant to the effect that, if he desired to renew the lease for another year, his rent for the premises, on and after October 1, 1921, would be $90 per month. On August

[illegible] - [illegible]

[illegible] TIMMONS, Appellee,	
vs.	APPEAL FROM MUNICIPAL COURT
[illegible] T. MONTGOMERY, Appellant.	OF [illegible].

MR. JUSTICE GRIGSBY DELIVERED THE OPINION OF THE COURT.

This is an action in forcible detainer commenced in the municipal court of Chicago on October 16, 1921. There was a jury trial and at the conclusion of all the evidence the court instructed the jury to return a verdict finding the defendant, Montgomery, guilty of unlawfully withholding from the plaintiff the possession of the premises described in the complaint, viz., the third apartment on the [illegible] floor of [illegible] Chicago, and that the right to the possession thereof is in the plaintiff. The jury returned such a verdict and on December 7, 1921, judgment was entered on the verdict and it was ordered that a writ of restitution issue. The defendant appealed.

The undisputed facts are [illegible] August 6, 1920, a written lease [illegible] was executed by the [illegible] October 1, 1920; [illegible] 1921, [illegible] tenant of the premises in question [illegible] the landlord's agents, [illegible] Co., [illegible] 1921, with Lockwood & Co. [illegible] to renew the lease for another year. [illegible] on and after October 1, 1921, [illegible] month.

30, 1921, Greenburg sold the premises, and assigned the lease and the rent secured thereby, to plaintiff. On September 3, 1921, before the expiration of the term of the lease, one Benjamin Harris, agent of the new owner (plaintiff), called on defendant and collected from him $80 as rent for the last month of the lease. At this interview Harris called attention to the Lackowski letter to defendant of July 20th, and again notified defendant that if he desired to remain as a tenant in the premises for another year the rent would be $90 per month, instead of $80. Defendant then voiced his objections to Harris as to paying the increased rental and said that he would move out. He did not however move, but remained in possession after September 30th. On October 3rd, Harris, acting for plaintiff, again called on defendant and demanded $90 for rent for the month of October, but defendant refused to pay that sum and tendered $80 to Harris, which the latter refused. On October 6th plaintiff caused the usual landlord's five day notice to be served on defendant, in which it was stated that $90 was due her as rent for the premises and that, unless payment therof was made on or before October 11th, defendant's lease of the premises would be terminated. Defendant did not pay the $90, and on October 13th the present action was commenced, at which time defendant was still in possession.

We are of the opinion that the trial court was right in directing a verdict in favor of plaintiff and in entering the judgment appealed from. We think that under the facts disclosed plaintiff had the right to elect to hold defendant as a tenant for another year at the new rental of $90. In Higgins v. Halligan, 46 Ill. 173, 180, it is decided in substance that,

30, 1981, Greenberg sold the premises, and assigned the lease and the rent security deposit, to plaintiff. On September 2, 1981, before the expiration of the term of the lease, one Benjamin Harris, agent of the new owner (plaintiff), called on defendant and collected from him $80 as rent for the last month of the lease. At this interview Harris called attention to the handwritten letter to defendant of July 30th, and again notified defendant that it be desired to remain as a tenant in the premises for another year the rent would be $90 per month, instead of $80. Defendant then voiced his objections to Harris as to paying the increased rental and said that he would move out. He did not however move, but remained in occupation after September 30th. On October 3rd, Harris, acting for plaintiff, again called on defendant and demanded $90 for rent for the month of October, but defendant refused to pay that sum and tendered $80 to Harris, which the latter refused. On October 4th plaintiff served the usual landlord's five day notice to be served on defendant, in which it was stated that $90 was due for rent for the premises and that, unless payment thereof was made on or before October 11th, defendant's lease of the premises would be terminated. Defendant did not pay the $90, and on October 12th the summary action was commenced, at which time defendant was still in possession.

[illegible]

[illegible] the judgment appealed from. [illegible] plaintiff has the right to claim [illegible] tenant for another year at the rate of $90. [illegible] v. Sullivan, 46 Ill. App. 174, 176, it is [illegible] .

where a landlord duly notifies a tenant, who is holding by the year, and before the year is out, that if he occupies the premises another year he must pay a certain increased rent, and the tenant does not surrender the possession of the premises but continues to occupy them, such act of the tenant will be construed as an implied agreement that he holds the premises on the new terms. (See also, Griffin v. Knisely, 75 Ill. 411, 417). And we think that, defendant having failed to pay the October rent at the new rate, plaintiff was warranted, after giving defendant due notice, in seeking to obtain the judgment for possession.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Barnes P. J., and Morrill J., concur.

where a landlord daily notifies a tenant, who is holding by the year, and before the year is out, that if he occupies the premises another year he must pay a certain increased rent, and the tenant does not surrender the possession of the premises but continues to occupy them, such act of the tenant will be construed as an implied agreement that he holds the premises on the new terms. (See, also, Griffin v. Kelsey, 75 Ill. 411, 417). And we think that, defendant having failed to pay the October rent at the new rate, plaintiff was warranted, after giving defendant due notice, in seeking to obtain the judgment for possession.

The judgment of the municipal court is affirmed.

AFFIRMED.

Barnes P. J., and Scott J., concur.

225 - 27701

LOUIS SCHNEIDERMAN,
Appellee,

vs.

C. M. EILLIDS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 606

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 10, 1921, a complaint in forcible detainer, in the name of Louis Schneiderman as plaintiff, was filed in the Municipal Court of Chicago, in which it was alleged that Schneiderman was entitled to the possession of "the store known as No. 1421-1/2 East 67th Street" in the City of Chicago, and that C. M. Eillids unlawfully withheld possession of the same from him. There was a trial without a jury resulting in the court finding defendant guilty and that the right to the possession of the premises was in plaintiff. Judgment on the finding was entered on October 25, 1921, and defendant appealed. No printed brief and argument on behalf of plaintiff has here been filed.

The bill of exceptions discloses that the plaintiff did not appear on the trial, that the sole witness for him was one Alvin L. Wagner, and that defendant testified in his own behalf. It appears that Wagner, as owner of the premises, leased them by written lease dated September 18, 1919, to defendant for a term of two years, ending September 30, 1921, at a rental of $32.50 per month for the first year, and $35 per month for the second year. This lease was introduced in evidence. Wagner testified that he leased the premises by another written lease to plaintiff for a term of two years commencing October 1, 1921, at a rental of $65 per month,

LOUIS SCHMEIDEMAN,
Appellee,

vs.

C. M. MILLIKE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE CRIDLEY DELIVERED THE OPINION OF THE COURT.

On October 10, 1921, a complaint in forcible detainer, in the name of Louis Schmeideman as plaintiff, was filed in the Municipal Court of Chicago, in which it was alleged that Schmeideman was entitled to the possession of "the store known as No. 1421-1/2 West 67th Street" in the City of Chicago, and that C. M. Millike unlawfully withheld possession of the same from him. There was a trial without a jury resulting in the court finding defendant guilty and that the right to the possession of the premises was in plaintiff. Judgment on the finding was entered on October 25, 1921, and defendant appealed. No printed brief and argument on behalf of plaintiff has been filed.

The bill of exceptions discloses that the plaintiff did not appear on the trial, that the sole witness for him was one Alvin L. Wagner, and that defendant testified in his own behalf. It appears that Wagner, as owner of the premises, leased them by written lease dated September 15, 1919, to defendant for a term of two years, ending September 30, 1921, at a rental of $32.50 per month for the first year, and $35 per month for the second year. This lease was introduced in evidence. Wagner testified that he leased the premises by another written lease to plaintiff for a term of two years commencing October 1, 1921, at a rental of $45 per month.

but this lease was not produced. He further testified that plaintiff was a tailor, but that he did not remember his address or place of business; that, as regards negotiations with defendant for a continuation of defendant's tenancy, he did not see defendant "until just before the lease was up," when he told him that he (defendant) "could take a new lease at the new rental ($65 per month) or leave it alone, just as he pleased." Defendant testified in substance that he was in the business of rug and carpet cleaning; that he first moved into the premises in question in 1917 and was occupying them, under the lease introduced in evidence, in September, 1921; that during that month he received a letter from Wagner notifying him that said lease would expire on September 30th, but that no mention was made in the letter of any increase in the rent; that about September 25th he called on Wagner and told him that he was "going to take the store," and that Wagner said nothing about any raise in the rent; that between September 25th and 30th he several times called at Wagner's office but was unable to see him; that on October 3rd he saw Wagner, who then for the first time said that the rent would be "$60 per month for the first year and $75 for the next year, and that if I didn't like it I could get out;" and on that day, October 3rd, Wagner "put a 'For Rent' sign in the store window;" and that he (defendant) "does not know any Schneiderman."

We have reached the conclusion that the finding is not supported by the evidence and that the judgment must be reversed. It is well settled that "one suing under the Forcible Entry and Detainer Act must show a right to possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess." (Fitzgerald v. Quinn, 165 Ill.

but this lease was not produced. He further testified that plaintiff was a tailor, but that he did not remember his address or place of business; that, as regards negotiations with defendant for a continuation of defendant's tenancy, he did not see defendant "until just before the lease was up," when he told him that he (defendant) "could take a new lease at the new rental ($65 per month) or leave it alone, just as he pleased." Defendant testified in substance that he was in the business of rug and carpet cleaning; that he first moved into the premises in question in 1917 and was occupying them, under the lease introduced in evidence, in September, 1921; that during that month he received a letter from Wagner notifying him that said lease would expire on September 30th, but that no mention was made in the letter of any increase in the rent; that about September 28th he called on Wagner and told him that he was "going to take the store," and that Wagner said nothing about any raise in the rent; that between September 28th and 30th he several times called at Wagner's office but was unable to see him; that on October 3rd he saw Wagner, who then for the first time said that the rent would be "$60 per month for the first year and $75 for the next year, and that if I didn't like it I could get out;" and on that day, October 3rd, Wagner "put a 'For Rent' sign in the store window;" and that he (defendant) "does not know any Schmoldurman."

We have reached the conclusion that the finding is not supported by the evidence and that the judgment must be reversed. It is well settled that "one suing under the Forcible Entry and Detainer Act must show a right to possession in himself, and he cannot rely upon the lack of right in those whom he seeks to dispossess." (Fitzgerald v. Quinn, 166 Ill.

354, 366.) The plaintiff did not show that he was entitled to the possession of the premises. Assuming that Wagner signed a written lease to plaintiff for a term commencing October 1, 1921, it does not appear that the latter accepted the lease or made any attempt to gain possession of the premises, or, indeed, that he in his own person claimed the right of possession. The uncontradicted testimony that on October 3, 1921, Wagner placed a "For Rent" sign in the store window at least suggests that at that time he had not leased the premises to plaintiff. Furthermore, plaintiff failed to make the necessary proof that at the time of the commencement of the action defendant was in possession of the premises and withholding the same. (McClusky v. Nelson, 179 Ill. App. 182, 185.)

The judgment of the Municipal Court is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Morrill, J., concur.

184, 366.) The plaintiff did not show that he was entitled to the possession of the premises. Assuming that Wagner signed a written lease to plaintiff for a term commencing October 1, 1921, it does not appear that the latter accepted the lease or made any attempt to gain possession of the premises, or, indeed, that he in his own person claimed the right of possession. The uncontradicted testimony that on October 3, 1921, Wagner placed a "For Rent" sign in the store window at least suggests that at that time he had not leased the premises to plaintiff. Furthermore, plaintiff failed to make the necessary proof that at the time of the commencement of the action defendant was in possession of the premises and withholding the same. (Modjusky v. Nelson, 179 Ill. App. 182, 185.)

The judgment of the Municipal Court is reversed.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Morrill, J., concur.

225 - 27701

FINDING OF FACTS.

We find as ultimate facts that at the time of the commencement of the present action the defendant, Killids, was not unlawfully withholding possession of the premises in question from plaintiff, and that at said time plaintiff was not entitled to the possession of said premises.

FINDING OF FACTS.

We find as ultimate facts that at the time of the commencement of the present action the defendant, Hillide, was not unlawfully withholding possession of the premises in question from plaintiff, and that at said time plaintiff was not entitled to the possession of said premises.

250 - 27726

HARRY HAMBORG and
CARRIE HAMBORG,
Appellees,

vs.

HENRY SCHRIK and JOHN SCHRIK,
copartners doing business as
HENRY SCHRIK & CO.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 606

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $494.65, rendered against defendants by the Municipal Court of Chicago on January 28, 1922, in a fourth class tort action tried before the court without a jury.

In their statement of claim, filed June 21, 1920, plaintiffs claimed damages as the result of defendants' act of filing for record on April 10, 1919, in the recorder's office of Cook County, a purported contract of sale by plaintiffs to one Tony Biondo of certain premises owned by plaintiffs in Cook County, Illinois, which said purported contract was afterwards removed as a cloud upon their title to said premises by decree of the Circuit Court of Cook County, entered March 5, 1920, in Chancery cause No. B-52247, instituted by them as complainants and in which the present defendants and said Biondo were defendants. Plaintiffs alleged in substance that shortly prior to the recording of said instrument a real estate broker, whom they had employed to sell the premises, obtained a buyer for the same and had procured a contract of sale to be signed, but that on account of the recording of said instrument by defendants said sale to said buyer was not consummated, yet plaintiffs were obliged to and did pay said broker his commission of

MARKY HAMMONS and
CARRIE HAMMONS,
Appellees,

vs.

HENRY SCHRIK and JOHN SCHRIK,
copartners doing business as
HENRY SCHRIK & CO.,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for $194.65, rendered against defendants by the Municipal Court of Chicago on January 26, 1922, in a fourth class tort action tried before the court without a jury.

In their statement of claim, filed June 21, 1920, plaintiffs claimed damages as the result of defendants' act of filing for record on April 10, 1919, in the recorder's office of Cook County, a purported contract of sale by plaintiffs to one Tony Blonde of certain premises owned by plaintiffs in Cook County, Illinois, which said purported contract was afterwards removed as a cloud upon their title to said premises by decree of the Circuit Court of Cook County, entered March 3, 1920, in Chancery cause No. H-82247, instituted by them as complainants and in which the present defendants and said Blonde were defendants. Plaintiffs alleged in substance that shortly prior to the recording of said instrument a real estate broker, whom they had employed to sell the premises, obtained a buyer for the same and had procured a contract of sale to be signed, but that on account of the recording of said instrument by defendants said sale to said buyer was not consummated, yet plaintiffs were obliged to and did pay said broker his commission of

$100, and suffered other damages, as itemized, making an aggregate of $739.65.

Defendants, in their affidavit of merits, admitted the filing of said instrument in the Recorder's office on April 10, 1919, stated that they caused it to be filed without malice or wrongful intention and simply to protect the interests of the purchaser therein named, and denied that plaintiffs were entitled to recover from them any sum as damages.

At the conclusion of the trial the court found the issues in favor of the plaintiffs and allowed them the following items of damages, as contained among other items in plaintiffs' statement of claim:

Commission paid said real estate broker, ---------	$100.
Extra expense for abstract continuation, showing above-mentioned chancery cause and said recorded instrument ----------	34.
Stenographer's fees paid over and above fees allowed in said chancery cause, ----------	10.65
Solicitor's fees in said chancery cause----------	250.
Attorney's fees for prosecuting the present tort action----------	100.
Total----------	$494.65

The main contentions of counsel for defendants are (1) that the finding and judgment are contrary to the evidence; (2) are contrary to the law; (3) that the court admitted certain improper evidence on behalf of plaintiffs; and (4) that the damages awarded are excessive.

No useful purpose will be served in detailing the evidence introduced at the trial. Suffice it to say that after a careful review of the evidence we are of the opinion that, as to the first four items of damages above mentioned, aggregating $394.65, the finding is amply supported by the evidence and justified in law (Philpot v. Taylor, 75 Ill. 309, 311.) We do not think that any error prejudicial to defendants

$100, and suffered other damages, as itemized, making an aggregate of $758.65.

Defendants, in their affidavit of merits, admitted the filing of said instrument in the Recorder's office on April 10, 1919, stated that they caused it to be filed without malice or wrongful intention and simply to protect the interests of the purchaser therein named, and denied that plaintiffs were entitled to recover from them any sum as damages.

At the conclusion of the trial the court found the issues in favor of the plaintiffs and allowed them the following items of damages, as contained among other items in plaintiffs' statement of claim:

Commission paid said real estate broker,	$100.
Extra expense for abstract continuation, showing above-mentioned chancery suits and said recorded instrument	34.
Stenographer's fees paid over and above fees allowed in said chancery cause,	10.65
Solicitor's fees in said chancery cause	250.
Attorney's fees for prosecuting the present tort action	100.
Total	$494.65

The main contentions of counsel for defendants are (1) that the finding and judgment are contrary to the evidence; (2) are contrary to the law; (3) that the court admitted certain improper evidence on behalf of plaintiffs; and (4) that the damages awarded are excessive.

No useful purpose will be served in detailing the evidence introduced at the trial. Suffice it to say that after a careful review of the evidence we are of the opinion that, as to the first four items of damages above mentioned, aggregating $394.65, the finding is amply supported by the evidence and justified in law (Philpot v. Taylor, 76 Ill. App. 321.) We do not think that any error prejudicial to defendants

was committed in the court's rulings on evidence, but we are of the opinion that the allowance of the last item of damages, viz: "Attorney's fees for prosecuting the present tort action, $100," cannot be sustained. (Washburne v. Burke, 84 Ill. App. 587, 589; Jones v. People, 19 Ill. App. 300, 303; Nickerson v. Babcock, 29 Ill. 497, 499.) In the Washburne case it is said: "An action at law is based upon the state of facts existing when the suit is begun, and claims not then due cannot be properly included in the judgment. When this suit was begun no attorney's fees in it had been earned, and there could be no recovery for such as might be subsequently earned."

The error in including said item of $100 in the finding and judgment is one that may be remedied by a remittitur. Accordingly, if the plaintiffs within ten days will file a remittitur in the sum of $100, the judgment will be affirmed for the sum of $394.55; otherwise, it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Barnes, P. J., and Morrill, J., concur.

was committed in the court's making an evidence, but we are of the opinion that the allowance of the last item of damages, viz: "Attorney's fees for prosecuting the present tort action, $100," cannot be sustained. (Mechmerse v. Burke, 64 Ill. App. 387, 389; Jones v. Doyle, 19 Ill. App. 406, 408; Blackman v. Hancock, 68 Ill. 497, 499.) In the Mechmerse case it is said: "An action at law is based upon the state of facts existing when the suit is begun, and claims not then due cannot be properly included in the judgment. When this suit was begun no attorney's fees in it had been earned, and there could be no recovery for such as might be subsequently earned."

The error in including said item of $100 in the finding and judgment is one that may be remedied by a remittitur. Accordingly, if the plaintiffs within ten days will file a remittitur in the sum of $100, the judgment will be affirmed for the sum of $374.25; otherwise, it will be reversed and the cause remanded.

AFFIRMED ON REMITTITUR.

Barnes, P. J., and Morrill, J., concur.

28251

GRAY NEWART & COMPANY,
a corporation,
Appellee,

vs.

JOSEPH JAFFE,
Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

227 I.A. 606

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On August 16, 1922, the complainant, Gray Newart & Company, an Illinois corporation, filed its verified bill in the Superior Court of Cook County for an injunction against the defendant and gave notice to him of the application for a temporary injunction. On the hearing of the application on August 18, 1922, defendant was present but he merely objected to the sufficiency of the bill. After reading the bill the court entered the injunctional order appealed from, wherein defendant was enjoined

> "from soliciting installment clothing business from any person or persons who are or were customers of the complainant herein at any time up to and including the first day of May, 1922, and from making use of, for his own information or benefit, or calling upon any of, the customers of the complainant in the City of Chicago, in so far as same pertains to the installment clothing business, and from soliciting the business, trade or custom of any of the customers of the complainant in the City of Chicago for a period of two (2) years from May 1, 1922; and from giving to any person, persons, firms or corporations directly or indirectly the names and addresses of any persons who were or are customers of the complainant up to and including the first day of May, 1922, for a period of two (2) years thereafter, and from doing or performing anything calculated to directly or indirectly violate the covenants and agreements of the contract dated May 1, 1922."

It appears from the allegations of the bill in substance that complainant is in the business of selling clothing on the installment plan; that in January, 1921, defendant was in the same business and acquainted with many persons

28231

GRAY REMART & COMPANY,
a corporation,

Appellee,

vs.

JOSEPH JAYES,

Appellant.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE CHILDRY DELIVERED THE OPINION OF THE COURT.

On August 16, 1922, the complainant, Gray Remart & Company, an Illinois corporation, filed its verified bill in the Superior Court of Cook County for an injunction against the defendant and gave notice to him of the application for a temporary injunction. On the hearing of the application on August 18, 1922, defendant was present but he merely objected to the sufficiency of the bill. After reading the bill the court entered the interlocutory order appealed from, wherein defendant was enjoined

> "from soliciting installment clothing business from any person or persons who are or were customers of the complainant herein at any time up to and including the first day of May, 1922, and from making use of, for his own information or benefit, or selling upon any of, the customers of the complainant in the City of Chicago, in so far as same pertains to the installment clothing business, and from soliciting the business, trade or custom of any of the customers of the complainant in the City of Chicago for a period of two (2) years from May 1, 1922; and from giving to any person, persons, firm or corporations directly or indirectly the names and addresses of any persons who were or are customers of the complainant up to and including the first day of May, 1922, for a period of two (2) years thereafter, and from doing or performing anything calculated to directly or indirectly violate the covenants and agreements of the contract dated May 1, 1922."

It appears from the allegations of the bill in substance that complainant is in the business of selling clothing on the installment plan; that in January, 1922, defendant was in the same business and associated with many persons

(purchasers of clothing) over a certain so-called trade route in Chicago; that during that month he sold to complainant the "route" and the good will thereof, purchased certain shares of stock in the complainant corporation and entered into its employ as a solicitor for business and so remained until May 1, 1922; that he sold said shares of stock to complainant for $3000, and by written agreement with it, entered into on May 1, 1922, agreed, in consideration of said sale and other valuable considerations, that he would not for a period of two (2) years from date make use of, for his own information or benefit, or call upon any of the customers in said route in Chicago, or any other of complainant's customers in Chicago, and would not solicit their business, trade or custom during said period, and would not give to any person, firm or corporation a list of their names and addresses; and further agreed that upon any violation of said covenants complainant might file a bill in equity to enjoin him from further violations; that since May 1, 1922, defendant has solicited, and taken away from complainant, the business and patronage of certain of complainant's customers on said trade route, and certain other regular customers of complainant in Chicago, and has made known to other persons, firms and corporations the names and addresses of many of complainant's customers in Chicago, and in still soliciting their trade and assisting others to do so; that the injuries which have thus been sustained and are being sustained by complainant cannot be adequately recompensed by a recovery of damages; and that said injuries and damage to complainant will be cumulative and continuous unless relieved and remedied by an injunction, etc.

(purchasers of clothing) over a certain so-called trade route in Chicago; that during that month he said to complainant the "route" and the good will thereof, purchased certain shares of stock in the complainant corporation and entered into its employ as a solicitor for business and so remained until May 1, 1922; that he said shares of stock to complainant for $5000, and by written agreement with it, entered into on May 1, 1922, agreed, in consideration of said sale and other valuable considerations, that he would not for a period of two (2) years from date make use of, for his own information or benefit, or call upon any of the customers in said route in Chicago, or any other of complainant's customers in Chicago, and would not solicit their business, trade or custom during said period, and would not give to any person, firm or corporation a list of their names and addresses; and further agreed that upon any violation of said covenants complainant might file a bill in equity to enjoin him from further violations; that since May 1, 1922, defendant has solicited, and taken away from complainant, the business and patronage of certain of complainant's customers on said trade route, and certain other regular customers of complainant in Chicago, and has made known to other persons, firms and corporations the names and addresses of many of complainant's customers in Chicago, and is still soliciting their trade and assisting others to do so; that the injuries which have thus been sustained and are being sustained by complainant cannot be adequately recompensed by a recovery of damages; and that said injuries and damage to complainant will be cumulative and continuous unless relieved and restrained by an injunction, etc.

After a careful reading of the verified bill we are of the opinion that the court was warranted in issuing a temporary injunction, substantially in accordance with the order above mentioned, but only "until the further order of the court." As issued the order permanently enjoins defendant from doing the things mentioned for the two year period ending May 1, 1924. On the question whether defendant should be permanently enjoined for said period, he is entitled after issues formed to a hearing upon the merits. In 22 Cyc. 740, it is said:

> "Preliminary or interlocutory injunctions are those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the court. They do not conclude the rights of the parties. Their object is to maintain the status quo, to maintain property in its existing condition, to prevent further or impending injury - not to determine the right itself. Therefore, where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted."

The order appealed from must therefore be reversed and the cause remanded with directions that the order be so modified as to disclose on its face that the injunction is only in force until the further order of the court.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Morrill, J., concur.

After a careful reading of the verified bill we are of the opinion that the court was warranted in issuing a temporary injunction, substantially in accordance with the order above mentioned, but only until the further order of the court." As issued the order permanently enjoins defendant from doing the things mentioned for the two year period ending May 1, 1924. On the question whether defendant should be permanently enjoined for said period, he is entitled after issues formed to a hearing upon the merits. In 22 Cyc. 740, it is said:

> "Preliminary or interlocutory injunctions are those granted prior to the final hearing and determination of the trial, and continue until answer, or until the final hearing, or until the further order of the court. They do not conclude the rights of the parties. Their object is to maintain the status quo, to maintain property in its existing condition, to prevent further or impending injury - not to determine the right itself. Therefore, where the issuance of a preliminary injunction would have the effect of granting all the relief that could be obtained by a final decree and would practically dispose of the whole case, it will not be granted."

The order appealed from must therefore be reversed and the cause remanded with directions that the order be so modified as to disclose on its face that the injunction is only in force until the further order of the court.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Morrill, J., concur.

38 - 27488

HARRY S. STEWART,
Plaintiff in Error,

vs.

EMILY H. JUNKIN,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 607

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court of Chicago to recover on a note for $10,000 dated July 26, 1910, executed by defendant in error, payable on demand to Emily S. Hutchinson, with interest at 5½% per year and bearing endorsements showing an interest payment of $200 and a transfer of the note to plaintiff in error. There was a former trial of the case, resulting in a judgment in favor of defendant for costs, which was reviewed by this court under a writ of error. The former judgment was reversed and the case remanded for the reason that the trial court had committed reversible error in receiving evidence tending to show payment of the note in the absence of any allegations in defendant's affidavit of defense, making payment a ground of defense. Stewart v. Junkin, 209 Ill. App. 186.

Plaintiff's statement of claim alleged the execution of the note, plaintiff's ownership thereof, demand and refusal of payment and an indebtedness in favor of plaintiff for the principal amount of the note and accrued interest thereon. After the reinstatement of the case in the Municipal Court and prior to the second trial, defendant filed an additional affidavit of merits, which in substance set up as grounds of defense that the note was executed with the express understanding between defendant and Emily S. Hutchinson, who was her mother,

38 - 27488

HARRY S. STEWART, Plaintiff in Error,		ERROR TO MUNICIPAL COURT OF CHICAGO.
vs.		
EMILY H. JUNKIN, Defendant in Error.		

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

Plaintiff in error brought suit in the Municipal Court of Chicago to recover on a note for $10,000 dated July 26, 1910, executed by defendant in error, payable on demand to Emily H. Hutchinson, with interest at 6% per year and bearing endorsements showing an interest payment of $300 and a transfer of the note to plaintiff in error. There was a former trial of the case, resulting in a judgment in favor of defendant for costs, which was reviewed by this court under a writ of error. The former judgment was reversed and the cause remanded for the reason that the trial court had committed reversible error in receiving evidence tending to show payment of the note in the absence of any allegations in defendant's affidavit of defense, making payment a ground of defense. Stewart v. Junkin, 308 Ill. , pp. 186.

Plaintiff's statement of claim alleged the execution of the note, plaintiff's ownership thereof, demand and refusal of payment and an indebtedness in favor of plaintiff for the principal amount of the note and accrued interest thereon. After the remanding of the case in the municipal court and prior to the second trial, defendant filed an additional affidavit of merits, which in substance set up as a ground of defense that the note was executed with the express understanding between defendant and Emily H. Hutchinson, who was her mother,

that it should not be a valid obligation during defendant's lifetime, and was never delivered; that the advance of $10,000 to defendant by her mother, was repaid by defendant to her mother before plaintiff obtained possession of the note, and further allegations to the effect that plaintiff paid no consideration for the note; that the transfer thereof to plaintiff was without good or valuable consideration, and that plaintiff did not acquire said instrument and is not a holder thereof in good faith. It is contended by plaintiff in error that it was error to permit defendant to plead the defense of payment upon the retrial of the cause. The authorities cited by plaintiff in error in support of this contention do not sustain the proposition. No motion was made in the Municipal Court to strike the affidavit of defense. The trial was by the court without a jury and resulted in a judgment in favor of defendant.

The evidence shows that Emily S. Hutchinson was the mother of defendant and that plaintiff is her nephew and defendant's cousin. Defendant was formerly the wife of H. T. Crane, now deceased. At the time of the making of the note the Chicago Orchestra Association, in which defendant was interested, needed funds to reduce a mortgage and applied to defendant for a contribution for that purpose. Defendant's husband, Mr. Crane, was unwilling to advance the money but did not object to the contribution being made by his wife out of her own funds. Defendant proposed to give the Association certain bonds of the value of $10,000, but in the course of a conversation with her mother, the latter suggested that it was unnecessary to cash the bonds, which were bearing four per cent interest, in view of the fact that she, Mrs. Hutchinson, had funds lying idle in the bank, upon which she was receiving

that it should not be a valid obligation during defendant's lifetime, and was never delivered; that the advance of $10,000 to defendant by her mother, was repaid by defendant to her mother before plaintiff obtained possession of the note, and further allegations to the effect that plaintiff paid no consideration for the note; that the transfer thereof to plaintiff was without good or valuable consideration, and that plaintiff did not acquire said instrument and is not a holder thereof in good faith. It is contended by plaintiff in error that it was error to permit defendant to plead the defense of payment upon the trial of the cause. The authorities cited by plaintiff in error in support of this contention do not sustain the proposition. No motion was made in the Municipal Court to strike the affidavit of defense. The trial was by the court without a jury and resulted in a judgment in favor of defendant.

The evidence shows that Mr. Hutchinson was the mother of defendant and that plaintiff is her nephew and defendant's cousin. Defendant was formerly the wife of H. T. Crane, now deceased. At the time of the making of the note the Chicago Orchestra Association, in which defendant was interested, needed funds to redeem a mortgage and applied to defendant for a contribution for that purpose. Defendant's husband, Mr. Crane, was unwilling to advance the money but did not object to the contribution being made by his wife out of her own funds. Defendant proposed to give the Association certain bonds of the value of $10,000, but in the course of a conversation with her mother, the latter suggested that it was unnecessary to cash the bonds, which were bearing four per cent interest, in view of the fact that she, Mrs. Hutchinson, had funds lying idle in the bank, upon which she was receiving

only two per cent. At this time she had over $16,000 in various bank accounts. Thereupon, on July 26, 1910, the contribution for $10,000 was made by a cashier's check on the Illinois Trust and Savings Bank, in which defendant's mother had an account. Prior to this transaction defendant had given her mother from time to time various sums aggregating about $25,000. These donations had extended over a period of several years, so that practically all the money that Mrs. Hutchinson had in her bank accounts represented gifts made to her by her daughter. Defendant supported her mother up to the time of her death in March, 1915.

The contribution to the Orchestra Association was made in July and nothing was said at that time concerning a note, but in September, 1910, Mrs. Hutchinson asked defendant to sign a note for $10,000, which she presented to her, stating that she wished the note to be executed and placed among defendant's papers so that in case of the daughter's death and her mother's survival there might be some record of the transaction. Defendant mildly protested against doing so, telling her mother that she was leaving her everything by her will, and that the note was unnecessary. The mother replied that wills were uncertain things and that the note was not for her to have anyway, but she merely wanted it found among defendant's papers to show the transaction. Defendant then executed the note as requested by her mother and placed it in one of the compartments of her safe which she kept in her closet. These facts are shown not only by the testimony of defendant but by that of another witness who had knowledge of the transaction through statements made by Mrs. Hutchinson.

Defendant testified that the next time she saw the note was at the first trial of the case and that she never delivered the note to her mother or anyone else. She further

only two per cent. At this time she had over $16,000 in various bank accounts. Thereupon, on July 26, 1911, the contribution for $20,000 was made by a cashier's check on the Illinois Trust and Savings Bank, in which defendant's mother had an account. Prior to this transaction defendant had given her mother from time to time various sums aggregating about $85,000. These donations had extended over a period of several years, so that practically all the money that Mrs. Hutchinson had in her bank accounts represented gifts made to her by her daughter. Defendant supported her mother up to the time of her death in March, 1915.

The contribution to the Orchestra Association was made in July and nothing was said at that time concerning a note, but in September, 1915, Mrs. Hutchinson asked defendant to sign a note for $20,000, which she presented to her, stating that she wished the note to be executed and placed among defendant's papers so that in case of the daughter's death and her mother's survival there might be some record of the transaction. Defendant mildly protested against doing so, telling her mother that she was leaving her everything by her will, and that the note was unnecessary. The mother replied that wills were uncertain things and that the note was not for her to have anyway, but she merely wanted it found among defendant's papers to show the transaction. Defendant then executed the note as requested by her mother and placed it in one of the compartments of her safe which she kept in her closet. These facts are shown not only by the testimony of defendant but by that of another witness who had knowledge of the transaction through statements made by Mrs. Hutchinson.

Defendant testified that the next time she saw the note was at the first trial of the case and that she never delivered the note to her mother or anyone else. The further

testified that in November, 1913, when she was in Virginia, she received a letter from her mother asking for the combination of the safe in question and stating that she wished to open it in order to obtain her trunk keys which were in the safe. Defendant thereupon caused her husband to write to her mother giving the combination and suggesting that she get her nephew, the plaintiff, to assist her in opening the safe. Mrs. Hutchinson and the plaintiff thereafter opened the safe and took therefrom the trunk keys and the note in controversy. This explanation as to the manner in which the note came into the hands of Mrs. Hutchinson is corroborated by the testimony of another witness. Plaintiff claims that he received the note in question as a gift from Mrs. Hutchinson on or about June 23, 1914. The record does not show that any demand for payment of the note was ever made by Mrs. Hutchinson or by plaintiff prior to the commencement of the action.

During the same year defendant began repaying to her mother the sum of $10,000, the first payment being a check for $2,000, on November 11, 1910. These payments continued through the years 1911 and 1912 and were made in amounts of $2,000 each, approximately six months apart. All payments except the last were made by defendant's checks, which were produced in court. The last payment was made in Paris, France, by a traveller's check of the American Express Company for $1,005, about which there is no dispute. Several of these payments were accompanied by the statement from defendant to her mother that they were made as payments on the advance of $10,000. This was particularly emphasized on the occasion of the last payment. Defendant subsequently expended large sums of money in caring for her mother during the latter's last illness, for doctor bills, nurses and various trips taken for the benefit of the mother's health. Mrs. Hutchinson died

testified that in November, 1919, when she was in Virginia, she received a letter from her mother making for the combination of the safe in question and stating that she wished to open it in order to obtain her trunk keys which were in the safe. Defendant thereupon caused her husband to write to her mother giving the combination and suggesting that she get her nephew, the plaintiff, to assist her in opening the safe. Mrs. Hutchinson and the plaintiff thereafter opened the safe and took therefrom the trunk keys and the note in controversy. This explanation as to the manner in which the note came into the hands of Mrs. Hutchinson is corroborated by the testimony of another witness. Plaintiff claims that he received the note in question as a gift from Mrs. Hutchinson on or about June 23, 1914. The record does not show that any demand for payment of the note was ever made by Mrs. Hutchinson or by plaintiff prior to the commencement of the action.

During the same year defendant began repaying to her mother the sum of $10,000, the first payment being a check for $2,000, on November 11, 1910. These payments continued through the years 1911 and 1912 and were made in amounts of $2,000 each, approximately six months apart. All payments except the last were made by defendant's check, which were produced in court. The last payment was made in Paris, France, by a traveller's check of the American Express Company for $1,000, about which there is no dispute. Several of these payments were accompanied by the statement from defendant to her mother that they were made as payments on the advance of $40,000. This was particularly emphasized on the occasion of the last payment. Defendant subsequently expended large sums of money in caring for her mother during the latter's last illness, for doctor bills, nurses and various trips taken for the benefit of the mother's health. Mrs. Hutchinson died

in March, 1915. While the evidence as to the manner in which plaintiff obtained possession of the note is conflicting, it is apparent that he acquired the note surreptitiously so far as defendant was concerned and that the latter never knew that he had it in his possession until after her mother's death.

The evidence fully establishes the repayment of the $10,000 advanced to the Orchestra Association by Mrs. Hutchinson on behalf of defendant long before plaintiff obtained the note. Plaintiff was not a holder for value in due course and took the note subject to all defenses existing between the original maker and payee. The evidence shows that the subsequent payments made by defendant to her mother were intended by her to be a repayment for this advance. Defendant's testimony upon the subject is undisputed and is to some extent corroborated. It is presumed that payments made by one who is indebted to another are intended to liquidate the existing indebtedness. Pope v. Dodson, 58 Ill. 360; Kinahan v. Butler, 133 Ill. App. 459; Miller v. Pratz, 179 id. 204.

It is contended by plaintiff in error that the court improperly admitted evidence of the parol agreement between defendant and her mother to the effect that the note was not to become operative during defendant's lifetime. Parol evidence is admissible to show that a purported written contract never had any existence as a valid and binding agreement. Belleville Savings Bank v. Bormman, 124 Ill. 200; Black v. W. St. L. & P. Ry. Co., 111 id. 352; Robinson v. Hessel, 86 Ill. App. 212; Burke v. Delaney, 153 U. S. 228. In construing section 16 of the Negotiable Instruments Act, it has been frequently held that evidence may be introduced to show that a note was not to become valid except upon the happening of a condition precedent. Straus v. Citizens State Bank, 254 Ill. 185; Maxwell v. Brown, 186 Ill.

in March, 1918. While the evidence as to the manner in which plaintiff obtained possession of the note is conflicting, it is apparent that he acquired the note surreptitiously so far as defendant was concerned and that the latter never knew that he had it in his possession until after her mother's death.

The evidence fully establishes the repayment of the $10,000 advanced to the Cremeatra Association by Mrs. Hutchinson on behalf of defendant long before plaintiff obtained the note. Plaintiff was not a holder for value in due course and took the note subject to all defenses existing between the original maker and payee. The evidence shows that the subsequent payments made by defendant to her mother were intended by her to be a repayment for this advance. Defendant's testimony upon the subject is undisputed and is to some extent corroborated. It is presumed that payments made by one who is indebted to another are intended to liquidate the existing indebtedness. Lyon v. Jackson, 58 Ill. 360; Kingman v. Butler, 133 Ill. App. 480; Miller v. Pratt, 179 id. 204.

It is contended by plaintiff in error that the court improperly admitted evidence of the parol agreement between defendant and her mother to the effect that the note was not to become operative during defendant's lifetime. Parol evidence is admissible to show that a purported written contract never had any existence as a valid and binding agreement. Bellaville Savings Bank v. Gorman, 124 Ill. 202; Black v. [illegible], 3 [illegible] Hy. Co., 111 id. 282; Robinson v. Hessel, 58 Ill. App. 219; Burke v. Delaney, 133 U. S. 253. In construing section 16 of the Negotiable Instruments Act, it has been frequently held that evidence may be introduced to show that a note was not to become valid except upon the happening of a condition precedent. Carman v. Citizens State Bank, 234 Ill. 188; Darrell v. Brown, 146 Ill.

App. 273.

It is well established that upon the trial of a cause by a judge without a jury the admission of incompetent evidence is not reversible error where competent evidence sustains the judgment. Kreiling v. Hortrup, 215 Ill. 195; Grand Pacific Hotel Co. v. Pinkerton, 217 id. 61; Pratt v. Davis, 224 id. 300.

The payment of the note was conclusively established by the evidence and the other defenses already mentioned were also proved by uncontradicted testimony. There was sufficient competent evidence to sustain the judgment. It was certainly not contrary to the manifest weight of the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

App. 275.

It is well established that upon the trial of a cause by a judge without a jury the admission of incompetent evidence is not reversible error where competent evidence sustains the judgment. Kuhlkin v. Norton, 218 Ill. 189; Grand Pacific Hotel Co. v. Finnerton, 217 id. 61; Pratt v. Davis, 224 id. 300.

The payment of the note was conclusively established by the evidence and the other defenses already mentioned were also proved by uncontradicted testimony. There was sufficient competent evidence to sustain the judgment. It was certainly not contrary to the manifest weight of the evidence.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Brickley, J., concur.

27581

107 - 27581.

AMERICAN BONDING AND CASUALTY COMPANY,

vs.

CHICAGO BONDING AND INSURANCE COMPANY, a corporation, et al.,

On Appeal of

ROBERTS & HEATH, Inc., Appellant,

vs.

LEONARD A. BRUNBAGE, Receiver, Appellee.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County disposing of the claim of Roberts & Heath, a corporation, against the American Bonding and Casualty Company for $52,302.53, being the amount of certain unearned premiums upon policies of insurance of various kinds alleged to have been issued by that company, and the Chicago Bonding and Insurance Company, which had been rendered null and void by the insolvency of both companies and consequent inability to meet obligations. There is no dispute as to the amount of the claim or the breach by the insurers of the contracts of insurance in question or as to the claimant's right of recovery. The case was consolidated for hearing with case number 27560, in which our opinion has this day been filed and to which we refer for a statement as to the issues involved in the original case, not deeming it necessary to restate them in detail.

The decree from which the present appeal is taken, entered on the same day as the final decree, reviewed in our opinion in case number 27560, found substantially the same facts that are set forth in the said final decree as to the consolidation of the Chicago Bonding and Insurance Company, an Illinois

AMERICAN SURETY AND CASUALTY COMPANY,

vs.

CHICAGO SCHOOLCRAFT INSURANCE COMPANY, a corporation, et al.,

On Appeal of

SCHOOL & MILLER, Inc.,
Appellant,

vs.

LORENZO A. BERNSTEIN, Receiver,
Appellee.

NO. 17,[illegible] SUPREME COURT, ILLINOIS CO. [illegible] COURT.

This is an appeal from a decree of the Superior Court of Cook County dismissing of the bill of complaint [illegible], a corporation, against the Chicago Schools Insurance Company for $28,302.83, being the amount of workmen's compensation, liability, public [illegible] policies of insurance [illegible] issued to [illegible] by that company, and the [illegible] Company, which was [illegible] of both companies and [illegible] there is no dispute as to the amount of the [illegible] by the insurers of the [illegible] to the claimant's right of recovery. The [illegible] for dealing with [illegible] may been filed [illegible] the issues involved in the [illegible] to consider them in detail.

The [illegible] stored on the [illegible] opinion in [illegible] that are [illegible] the [illegible] [illegible]

corporation, with the American Bonding and Casualty Company, an Iowa corporation, and that the said Consolidated Company is justly indebted to claimant in the sum of $52,302.53; that the Illinois company prior to March 2, 1920, executed sundry insurance policies of various kinds under which the insured paid premiums; that the Iowa company prior to January 24, 1921, executed and delivered sundry other policies of insurance of various kinds on which similar premiums were paid. The decree recited the appointment of the various receivers mentioned in said final decree, the insolvency of the Iowa company on and after January 24, 1921, and its inability to meet its obligations; that as a result of the consolidation the Consolidated Company became indebted to the claimant for the unearned portion of said premiums on policies issued by both companies, computing from January 24, 1921, of which amount $50,014.14 was the unearned premium on policies issued by the Consolidated Company and $2288.39 was the unearned premium on policies issued by the Illinois Company in cases wherein the holders of said policies had not recognized the Consolidated Company as their debtor. The decree further found the breach of all of the said contracts of insurance and obligations connected therewith by the Consolidated Company and the reinsurance of the risks covered by these policies and the assignment to the claimant of the respective claims arising therefrom; that the Illinois company is indebted to the claimant for unearned premiums under policies issued by it, whose holders have not recognized the Consolidated Company as their debtor, in the sum of $2288.39; that under the final decree entered in this cause, the capital stock deposit of the Illinois company, made pursuant to the provisions of the Illinois Surety Act, is not subject to the payment of claims against either

corporation, with the American Bonding and Casualty Company, an Iowa corporation, and that the said Consolidated Company is jointly indebted to plaintiff in the sum of $82,302.62; that the Illinois company prior to March 2, 1920, issued many insurance policies of various kinds under which the insured paid premiums; that the Iowa company prior to January 24, 1921, assumed and delivered many other policies of insurance of various kinds on which similar premiums were paid. The issues involved the appointments of the various receivers mentioned in said final decree, the insolvency of the Iowa company on and after January 24, 1921, and its inability to meet its obligations; that as a result of the consolidation the Consolidated Company became indebted to the obligant for the unearned portion of said premiums on policies issued by both companies, computing from date January 24, 1921, at which amount $82,302.62 was the unearned premiums on policies issued by the Consolidated Company and $22282.80 was the unearned premium on policies issued by the Illinois Company in which records the obligee if said policies had not terminated the consolidated company in their entirety. The decree further found the amount of all of the said unearned premiums and obligations transferred directly by the consolidated company and the reinsurance of the risks assumed by other policies and the assignment to the obligee. The intervenor claims arising therefrom, that the Illinois company is indebted to the obligee for unearned premiums [illegible] it, which policies have not terminated [illegible] company in their entirety, [illegible] decree entered in this cause, the [illegible] Illinois company, [illegible] entry not, in [illegible]

the American Bonding and Casualty Company or the Consolidated Company until payment has been made of all claims against the Illinois company, in which the claimants have not recognized the Consolidated Company as their debtor.

It was therefore ordered by the court that the claim of Roberts & Heath, Inc., to the amount of $60,014.14 be disallowed and that its claim to the amount of $2286.39 be allowed, to be paid in full or to the extent of such pro rata amount as it shall be entitled to receive upon a distribution of said capital stock deposit among other claims of a similar character.

This order was in strict conformity with the final decree entered in the case, which we have affirmed in our opinion in case number 27560. It therefore follows that the decree upon the claim of Roberts & Heath, Inc., herein involved must be affirmed.

AFFIRMED.

BARNES, P. J., and GRIDLEY, J., concur.

the American Trading and Security Company or the Consolidated Company until payment has been made of all claims against the Illinois company, in which the claimants have not recognized the Consolidated Company as their debtor.

It was therefore ordered by the court that the claim of Roberts & Smith, Inc., in the amount of $65,014.14 be disallowed and that the claim in the amount of $4484.38 be allowed, to be paid in full or to the extent of such pro rata assets as it shall be entitled to receive upon a distribution of such capital stock deposit among other claims of a similar character.

This order was in strict conformity with the final decree entered in the case, which we have affirmed in our opinion in case number 47580. It therefore follows that the decree upon the claim of Roberts & Smith, Inc., herein involved must be affirmed.

AFFIRMED.

HERSHEY, P. J., and SHIRLEY, J., concur.

129 - 27603.

ALFRED KLINGBEIL, a minor, by Fred Klingbeil, his father and next friend, Appellant,	)	APPEAL FROM CIRCUIT COURT
vs.	)	OF COOK COUNTY.
THE LEDERER COMPANY, Appellee.	)	

227 I.A. 307

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The appellant, a minor of the age of eight years and five months, brought suit in the Circuit Court of Cook County against appellee to recover damages resulting from a fall from a platform at the base of a door opening into an elevator shaft to the concrete floor at the base of the shaft. Appellee owned the premises in question. The door opened upon a public alley.

The amended declaration in substance alleged the facts above stated with other details, and further charged that the opening into the elevator shaft was barred by a chain and that the opening was dangerous; that it was the custom of appellee for a long time prior to the accident to distribute kindling wood and waste food to children at this opening; that they were attracted to climb upon the platform, to swing on the chain and to look down the elevator shaft, with the knowledge and permission of appellee; that it was the duty of appellee, under such circumstances, to properly guard the opening so that children while upon the platform and leaning against the chain would not fall into the elevator shaft through the door; that appellant negligently permitted the chain to be improperly fastened, by reason whereof it slipped or broke from its fastening while appellant was upon the platform and swinging on the chain, resulting in appellant's fall and consequent injury.

There was a trial before the court with a jury. At the

129 - 47608.

ALFRED KLINGSEIL, a minor, by Fred Klingseil, his father and next friend, Appellant, vs. THE LEADER COMPANY, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

Jan. 1, 1907.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

The appellant, a minor of the age of eight years and five months, brought suit in the Circuit Court of Cook County against appellee to recover damages resulting from a fall from a platform at the base of a door opening into an elevator shaft to the concrete floor at the base of the shaft. Appellee owned the premises in question. The door opened upon a public alley.

The amended declaration in substance alleged the facts above stated with other details, and further charged that the opening into the elevator shaft was caused by a chain and that the opening was dangerous; that it was the custom of appellee for a long time prior to the accident to place in front of the opening wood and waste food to children of this age, knowing that they were attracted to climb upon the platform, to walk on the chain and to look down the elevator on it, with the knowledge and acquiescence of appellee; that it was the duty of appellee, under such circumstances, to properly guard the opening so that children while upon the platform and leaning against the chain would not fall into the elevator shaft through the door; that appellee negligently permitted the chain to be improperly fastened, so that when, by reason thereof it slipped or broke from its fastening, the appellant was upon the platform and falling against the chain, resulting in appellant's fall and consequent injury.

There was a trial before the court without jury. At the

conclusion of plaintiff's case the court instructed the jury to find defendant not guilty, and after denying a motion for a new trial entered judgment, from which this appeal has been prosecuted.

As the case must be tried again, we do not deem it advisable to discuss the evidence in detail. It is sufficient to state that in our opinion it tended to prove the allegations of the declaration.

The authorities applicable to this kind of a case were reviewed extensively in Rost v. Parker Washington Co., 178 Ill. App. 245, in which the City of Pekin v. McMahon, 154 Ill. 141, was cited as stating the general rule to the effect that the law does not require the owner of land to keep his premises in safe condition for the benefit of trespassers or those who go upon them without invitation, either express or implied; yet there is an exception to this rule in favor of young children "if the things causing the injury have been left exposed and unguarded and are of such a character as to be an attraction to a child, appealing to his childish curiosity and instincts." Under the authorities in this state, unguarded premises supplied with dangerous attractions are regarded as holding out an implied invitation to children, which will make the owner of the premises liable for injuries to them even though the children be technical trespassers. Stollery v. Cicero & Proviso Street Ry. Co., 243 Ill. 290, citing numerous authorities. This exception has been qualified in some cases by holding that the attraction must be upon premises adjacent to a public street or other public place where children of tender years may rightfully go, and the situation must be such as to charge the owner of the premises with knowledge of the danger to children if left unguarded or unprotected. Rost v. Parker Washington Co., supra. The question of

conclusion of plaintiff's case the court instructed the jury to find defendant not guilty, and after denying a motion for a new trial entered judgment, from which this appeal has been prosecuted.

In the case must be tried again, we do not deem it advisable to discuss the evidence in detail. It is sufficient to state that in our opinion it tended to prove the allegations of the declaration.

The authorities applicable to this kind of a case were reviewed extensively in Jost v. Barker Washington Co., 175 Ill. App. 362, in which the City of Paris v. Redman, 154 Ill. 161, was cited as stating the general rule to the effect that the law does not require the owner of land to keep his premises in safe condition for the benefit of trespassers or those who go upon them without invitation, either express or implied; but there is an exception to this rule in favor of young children "if the things causing the injury have been left exposed and unguarded and are of such a dangerous character as to be an attraction to children, appealing to their childish curiosity and instincts." [illegible] the authorities in this state, dangerous premises frequented by children with dangerous attractions are considered as but one out of a [illegible] invitation to children, which will [illegible] the owner of the premises liable for injuries to them even [illegible] the children to [illegible] trespassers. Kostka v. Illinois Steel Co., [illegible] Ill. 320, citing numerous authorities. [illegible] also [illegible] qualified in some cases by stating that the attractiveness of open premises adjacent to a public street [illegible] where children of tender years [illegible] attraction must be such as to charge the owner of the premises with knowledge of the danger to children if [illegible] trespassers. Jost v. Barker Washington Co., supra. [illegible]

what is or is not an attraction is ordinarily a question of fact for the jury. Stollery v. C. S. Ry. Co., supra; Rost v. Parker Washington Co., supra; City of Pekin v. McMahon, supra; Oglesby v. Metropolitan E. S. E. Ry. Co., 219 Ill. App. 321.

The directed verdict for defendant in this case was improper, as there was evidence in the record from which, had it stood alone, the jury could, without acting unreasonably in the eye of the law, find that all of the material averments of the declaration had been proved. Under such circumstances, the case should go to the jury. Libby, McNeill & Libby v. Cook, 223 Ill. 206.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Gridley, J., concurs; Barnes, P. J. dissents.

what is or is not an attraction is ordinarily a question of fact for the jury. Williams v. G. N. Ry. Co., supra; Kost v. Parker Washington Co., supra; City of Ixonia v. Monahan, supra; Delaney v. Metropolitan L. I. & Ry. Co., 112 III. App. 321.

The directed verdict for defendant in this case was improper, as there was evidence in the record from which, had it stood alone, the jury could, without acting arbitrarily in the eye of the law, find that all of the material averments of the declaration had been proved. Under such circumstances, the case should go to the jury. Libby, McNeill & Libby v. Cook, 224 III. 506.

The judgment of the Circuit Court is reversed and the case remanded.

REVERSED AND REMANDED.

Brierly, J., concurs; Barnes, P. J. dissents.

MR. PRESIDING JUSTICE BARNES DISSENTING.

I cannot concur in this conclusion. The action is predicated, and was tried, upon the theory of an attractive nuisance. But in my opinion the evidence has no tendency to sustain it. There is scarcely any limit to a child's curiosity, and a mere attempt to gratify it is not of itself sufficient to make the attractive thing an attractive nuisance. Every dangerous situation a child may go to from a public place is not necessarily an attractive nuisance because of its accessibility. It must possess features or elements that naturally and generally excite a child's curiosity and induce its gratification, usually by handling or playing with or on it. While the doctrine has received considerable extension of late without any very clear line of demarcation I am unprepared to carry it to the extent sought in this case. If the admitted state of facts here present a case for its application it is difficult to conceive of the limits of the doctrine, and would seemingly require every place of business to be constructed or guarded with reference to insuring the safety of children who may come near it from a public street or place.

MR. PRESIDING JUSTICE MARMES DISSENTING.

I cannot concur in this conclusion. The action is predicated, and was tried, upon the theory of an attractive nuisance. But in my opinion the evidence has no tendency to sustain it. There is scarcely any limit to a child's curiosity, and a mere attempt to gratify it is not of itself sufficient to make the attractive thing an attractive nuisance. Every dangerous situation a child may go to from a public place is not necessarily an attractive nuisance because of its accessibility. It must possess features or elements that naturally and generally excite a child's curiosity and induce its gratification, usually by handling or playing with or on it. While the doctrine has received considerable extension of late without any very clear line of demarcation I am unprepared to carry it to the extent sought in this case. If the admitted state of facts here present a case for its application it is difficult to conceive of the limits of the doctrine, and would seemingly require every place of business to be constructed or guarded with reference to insuring the safety of children who may come near it from a public street or place.

138 - 27615.

CARL WEILAND,
Appellee,

vs.

CHRIS G. STEGER, et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

227 I.A. 607

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit to recover damages sustained by plaintiff, who is appellee, as the result of an accident which occurred while plaintiff was working as a farm laborer for John V. Steger, since deceased, on the latter's farm. The defendants are the executors of the last will and testament of said decedent. The accident occurred November 15, 1915. There was a jury trial resulting in a verdict in favor of plaintiff for $10,750, from which $7750 was remitted. After the denial of motions for a new trial and in arrest of judgment, the court entered judgment for $3,000, from which this appeal has been prosecuted. No evidence was offered on behalf of defendant, but after the close of plaintiff's evidence a motion for an instructed verdict in favor of defendant was denied.

The undisputed evidence in the case shows that plaintiff, who was experienced in farm work, was employed on the farm of said decedent prior to and at the time of the accident, during all of which period he used a three-horse team and the hauling apparatus attached thereto, which he was using at the time of the accident. On the morning of November 15, 1915, he was directed by the foreman to assist with his team in filling a ditch on the farm where tile had been placed. In doing this work two teams of horses were employed, one being hitched at each end of a hickory log, called an evener, plaintiff's team being hitched

No. 5271 A. 607

JOHN - EVELO.

CLARK HEINARD,
Appellee.

vs.

CHARLES G. STEGER, et al.,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit to recover damages sustained by plaintiff, who is appellee, as the result of an accident which occurred while plaintiff was working as a farm laborer for John V. Steger, since deceased, on the latter's farm. The defendants are the executors of the last will and testament of said decedent. The accident occurred November 14, 1910. There was a jury trial resulting in a verdict in favor of plaintiff for $10,750, from which $2750 was remitted. After the denial of motions for a new trial and in arrest of judgment, the court entered judgment for $8,000, from which this appeal has been prosecuted. No evidence was offered on behalf of defendant, but after the close of plaintiff's evidence a motion for an instructed verdict in favor of defendant was denied.

The undisputed evidence in the case shows that plaintiff, who was experienced in farm work, was employed on the farm of said deceased prior to and at the time of the accident, during all of which period he used a three-horse team and the hoisting apparatus attached thereto, which he was using at the time of the accident. On the morning of November 14, 1910, he was directed by the foreman to assist with his team in filling a silo on the farm where the silo had been placed. In addition to the team of horses were employed, one Dalton Kitchen, of Oak Park, a hickory log, called an sweep, plaintiff's team being hitched

to the left end thereof by means of a chain fastened around the evener and attached to a hook on the double-tree of his team. A team of two horses driven by another farm hand was hitched to the other end of the evener. A plow was attached to the middle of the evener, which was guided by the foreman. One team was on each side of the ditch, into which the plow threw the dirt. The evener was the trunk of a young hickory tree from 20 to 24 feet in length and from 7 to 8 inches in diameter, and had been continuously used for about two months up to the time of the accident. Its use was continued thereafter. In driving his team plaintiff walked about four feet behind the end of the evener. Just before the accident, the plow encountered a piece of frozen ground, causing the horses to settle down and pull hard, as they had done on similar occasions the same day. The accident was due to the breaking of the hook attached to the double-tree of the three-horse team driven by plaintiff, to which the chain from the evener was attached. The team on the other end of the evener continued to pull so that plaintiff's end of the evener was swung back, striking him with great force on his legs and causing the injuries of which he complains.

We find no evidence tending to show that the hook was old, rusty, cracked, weak or insufficient in any respect, as charged in the declaration, or that the hook was defective in any way. Plaintiff had not worked at this particular job prior to the day in question, but on the morning of the accident and prior thereto, he had been working steadily for two hours, during all of which time he walked directly behind the evener. The evidence shows that under the strain caused by the pulling of the horses, the evener bent somewhat in the center. The bending was obvious and seen by plaintiff. Shortly prior to the accident plaintiff's foreman suggested that he walk outside of the

to the left was thereof by means of a chain fastened around the
wagon and attached to a hook on the double-tree of his team.
A team of two horses driven by another farm hand was hitched to
the other end of the wagon. A plow was attached to the middle
of the wagon, which was guided by the foreman. The team was
on each side of the ditch, into which the plow threw the dirt.
The wagon was the trunk of a young factory tree from 20 to 24
feet in length and from 7 to 8 inches in diameter, and had been
continuously used for years and months up to the time of the
accident. It was one condemned therefore. In driving his
team plaintiff walked about four feet behind the end of the
wagon. Just before the accident, the plow encountered a piece
of frozen ground, causing the horses to settle. The ground
hard, as they had done on similar occasions the same day. The
accident was due to the breaking of the hook attached to the
double-tree of the three-horse team driven by plaintiff, to which
the chain from the wagon was attached. The team on the other
end of the wagon continued to pull so that plaintiff's end of
the wagon was empty, striking him with great force on his
legs and causing the injuries of which he complains.

There was no evidence tending to show that the hook was
old, rusty, crooked, weak or in any defect in any respect, or
charges in the defendants, or that the hook was defective in
any way. Plaintiff had not worked at this [illegible] prior
to the day in question, but of the number of [illegible] and
prior thereto, he had been working steadily for the [illegible]
all of which time he [illegible] steadily [illegible] the wagon. The
evidence shows that under the chain owned by the [illegible] of
the horses, the wagon had accompanied in the [illegible]
ing was obvious and seen by plaintiff. [illegible] the con-
sident plaintiff's forces suggested that the hook outside of the

end of the evener, in order to avoid any accident through possible breaking of the apparatus. Plaintiff apparently appreciated this danger, because the chain to which the hook was fastened slipped a short time prior to the accident and he then warned the driver of the team at the other end to keep watch, as the chain might become loosened again. After this warning the driver of the other team walked outside the end of the evener. As defendant introduced no testimony, the above facts as shown by plaintiff's witnesses are uncontradicted.

We find no evidence in the record tending to show that defendants' testate, John V. Steger, was guilty of any negligence which caused the injuries sustained by plaintiff, and no evidence tending to sustain the charge that the hook, the breaking of which caused the accident, was in any way defective. The fact that the hook broke, thereby releasing the strain upon the end of the evener to which plaintiff's team was attached and thereby causing the accident, does not show that plaintiff's employer was guilty of negligence. It has been held frequently by the reviewing courts of this state that the mere breaking of the instrumentality employed is not sufficient to prove negligence on the part of the employer. Zack v. Dolese, 137 Ill. 129; Chicago Edison Co. v. Moren, 86 Ill. App. 152; Medley v. American Car Foundry Co., 140 id. 284; Colfax Coal & Mining Co. v. Johnson, 52 id. 382. The burden was upon plaintiff to prove negligence on the part of defendant and was not discharged by mere proof of the accident. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338; Geraghty v. Grace Co., 157 Ill. App. 309.

Plaintiff was an experienced farmer and had been working with the team in question for a considerable time, during all of which period he had used the apparatus other than the evener to which the hook in question was attached. The evidence

and of the owner, in order to avoid any accident through possible breaking of the apparatus. Plaintiff apparently appreciated this danger, because the chain to which the hook was fastened slipped a short time prior to the accident and he then warned the driver of the team of the other and to keep watch, as the chain might become loosened again. After this warning the driver of the other team walked outside the end of the wagon. As defendant intervened no testimony, the above facts as shown by plaintiff's witnesses are uncontradicted.

We find no evidence in the record tending to show that defendants' testate, John V. Geyer, was guilty of any negligence which caused the injuries sustained by plaintiff, and no evidence tending to sustain the charge that the hook, the breaking of which caused the accident, was in any way defective. The fact that the hook broke, thereby releasing the strain upon the end of the wagon to which plaintiff's team was attached and thereby causing the accident, does not show that plaintiff's employer was guilty of negligence. It has been held frequently by the reviewing courts of this state that the mere breaking of the instrumentality employed is not sufficient to prove negligence on the part of the employer. Cook v. Joline, 107 Ill. 129; Chicago Union Co. v. Force, 60 Ill. App. 152; Medley v. American Car Foundry Co., 140 Ia. 554; Wolfe Coal & Mining Co. v. Johnson, 32 Ia. 73. The burden was upon plaintiff to prove negligence on the part of defendant and was not discharged by mere proof of the accident. Diamond Glue Co. v. Heisenhemmel, 227 Ill. 358; Jernegan v. Dixon Co., 147 Ill. App. 209.

Plaintiff was an experienced farmer and had been working with the team in question for - months, during all of which period he has been the operative other than the owner to which the hook in question was attached. The evidence

shows that he was fully informed of the dangerous features of the work in which he was employed. This appears from the warning given him by the foreman and the warning which plaintiff gave to his fellow worker. There was nothing complicated about the apparatus with which he was working at the time, and from his experience, it is apparent that he was as well informed regarding double-trees, hooks and other farm appliances as the owner. He was fully aware of all of the conditions under which he was working. He was of mature years and more than ordinary experience, endowed with his natural faculties, and must be held to have been fully informed as to conditions under which he was working. He was able to comprehend the nature and probable results following from the use of such an appliance. Under such circumstances, he is chargeable with knowledge of the ordinary conditions under which the work was being conducted, and its ordinary risks and hazards, and will be presumed to have assumed all such risks, which to a person of his experience and understanding should have been obvious. C. & E. I. R. R. Co. v. Heerey, 203 Ill. 492; McCormick Machine Co. v. Zackzewski, 220 id. 552; Jenco v. Illinois Steel Co., 233 Ill. 301.

No negligence on the part of the employer having been shown and it appearing that plaintiff assumed the risks of his employment, it follows that the judgment of the Circuit Court must be reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

shows that he was fully informed of the dangerous features of the work in which he was employed. This appears from the warning given him by the foreman and the warning which plaintiff gave to his fellow worker. There was nothing complicated about the apparatus with which he was working at the time, and from his experience, it is apparent that he was as well informed regarding double-trees, hooks and other farm appliances as the owner. He was fully aware of all of the conditions under which he was working. He was of mature years and more than ordinary experience, endowed with his natural faculties, and must be held to have been fully informed as to conditions under which he was working. He was a to comprehend the nature and probable results following from the use of such appliances. Under such circumstances, he is chargeable with the knowledge of the ordinary conditions under which the work was being conducted, and the ordinary risks and hazards, and will be presumed to have assumed all such risks, which to a person of his experience and understanding should be open and obvious. *Y. & L. R. R. Co. v. Henry*, 208 Ill. 492; *Kankakee Knitting Co. v. Kreczmanski*, 230 id. 588; *Jones v. Illinois Steel Co.*, 156 Ill. 101.

No negligence on the part of the employer having been shown and it appearing that plaintiff assumed the risks of his employment, it follows that the judgment of the circuit court must be reversed with a finding of facts.

IV - C - 2 FINDING OF FACTS.

Barnes, J., and Carter, J., concur.

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff's employer was not guilty of the negligence charged in the declaration and that plaintiff assumed the risks of his employment.

128 - 27613.

VIEWING OF PARTS.

We find no mistake law in this case that plaintiff's employer was not guilty of the negligence charged in the declaration and that plaintiff assumed the risks of his employment.

179 - 27655

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN B. HITTELL,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation, PERCY B. COFFIN, JOSEPH P. GEARY and ALEXANDER J. JOHNSON, as Civil Service Commissioners of the City of Chicago, and MICHAEL J. FAHERTY, OSCAR WOLFF, DAVID W. CLARK, IRENE PEASE MAYTONA, L. WITHALL and EDWARD J. GLACKIN, as Board of Local Improvements of the City of Chicago, and JULIUS GABLEMAN,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

227 I.A. 6177

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County directing that a peremptory writ of mandamus issue in substance directing the Civil Service Commission of the City of Chicago and the Board of Local Improvements of said city to forthwith restore the petitioner to the position of Chief Street Engineer for the Board of Local Improvements of the City of Chicago, said position being also designated as Chief Engineer of Streets for the said Board of Local Improvements, to the end that said petitioner may enter upon and discharge the duties thereof.

General and special demurrers to the amended petition were filed on behalf of the various respondents, all of which were overruled on July 16, 1921, and thereupon said respondents elected to stand by their demurrers. It then became the duty of the court to enter judgment as prayed in the amended petition. On September 13, 1921, the case was brought to the attention of the court upon the motion of the attorney

179 - 37555

PEOPLE OF THE STATE OF ILLINOIS, ex rel. JOHN S. RITTER, Appellee,	
vs.	APPEAL FROM
CITY OF CHICAGO, a municipal Corporation, FRANK K. COPPIN, JOSEPH P. CONRY and ANNAKAMIN I. JOHNSON, as Civil Service Commissioners of the City of Chicago, and MICHAEL J. FARRELLY, OSCAR NOLEN, DAVID W. CLARK, IRENE EMAZE HAYTONA, L. WITHALM and EDWARD J. CHAPIN, as Board of Local Improvements of the City of Chicago, and JULIUS CAHLMAN, Appellants.	CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County directing that a peremptory writ of mandamus issue in substance directing the Civil Service Commission of the City of Chicago and the Board of Local Improvements of said city to forthwith restore the petitioner to the position of Chief Street Engineer for the Board of Local Improvements of the City of Chicago, said position being also designated as Chief Engineer of Streets for the said Board of Local Improvements, to the end that said petitioner may enter upon and discharge the duties thereof.

General and special demurrers to the amended petition were filed on behalf of the various respondents, all of which were overruled on July 16, 1921, and thereupon said respondents elected to stand by their demurrers. It then became the duty of the court to enter judgment as prayed in the amended petition. On September 13, 1921, the case was brought to the attention of the court upon the motion of the attorney

for the relator for a peremptory writ of mandamus and upon a counter-motion of the respondents for leave to answer the amended petition and was set for hearing on October 1, 1921, on which date the Circuit Court denied the motion of the respondents for leave to answer the amended petition and entered the judgment order above mentioned.

It is urged by appellants that the court erred in overruling their motion for leave to answer the amended petition, citing authorities to the effect that almost as a matter of course a respondent should be allowed to plead over upon the overruling of a demurrer to the amended petition. This is undoubtedly the general rule, but is not applicable to the present case, in which the respondents elected to abide by their demurrer and sought, when the case was called for trial some months later, to change their position and thereby cause further delay. The trial court was vested with discretionary power in passing upon respondent's motion. It does not appear from the record that any draft of the proposed answer was presented with the motion. No showing as to any disputed facts was made and no argument is addressed to this court indicating any intention on the part of respondents to raise any questions of fact on the issues tendered by the amended petition. Therefore, we are of the opinion that there was no abuse of discretion in denying the motion by the respondents for leave to answer. Berry v. Turner, 279 Ill. 338; Ricker v. Beefield, 28 Ill. App. 32. The record in the present case shows no reason why the Circuit Court should have allowed the respondents to answer after they had elected to stand by their demurrers.

It is also urged by appellants that the proceeding is fatally defective by reason of the fact that the City of

for the relator for a peremptory writ of mandamus and upon a counter-motion of the respondents for leave to answer the amended petition and was set for hearing on October 1, 1921, on which date the Circuit Court denied the motion of the respondents for leave to answer the amended petition and entered the judgment order above mentioned.

It is urged by appellants that the court erred in overruling their motion for leave to answer the amended petition, citing authorities to the effect that almost as a matter of course a respondent should be allowed to plead over upon the overruling of a demurrer to the amended petition. This is undoubtedly the general rule, but is not applicable to the present case, in which the respondents elected to abide by their demurrer and sought, when the case was called for trial some months later, to change their position and thereby cause further delay. The trial court was vested with discretionary power in passing upon respondent's motion. It does not appear from the record that any draft of the proposed answer was presented with the motion. No showing as to any disputed facts was made and no argument is addressed to this court indicating any intention on the part of respondents to raise any questions of fact on the issues tendered by the amended petition. Therefore, we are of the opinion that there was no abuse of discretion in denying the motion by the respondents for leave to answer. Perry v. Turner, 270 Ill. 330; Hickey v. Hoeflich, 28 Ill. App. 32. The record in the present case shows no reason why the Circuit Court should have allowed the respondents to answer after they had elected to stand by their demurrers.

It is also urged by appellants that the proceeding is fatally defective by reason of the fact that the City of

Chicago, a municipal corporation, and Julius Gableman were made parties respondent thereto against whom no relief was granted, and that by reason of this misjoinder of parties the peremptory writ of mandamus cannot issue. That both of these respondents were within the jurisdiction of the trial court is shown by the fact that they were both personally served with summons in this cause. Both of them had an interest in the right or duty sought to be enforced by the writ, that is collaterally determined by the judgment rendered in this case. Gableman is the incumbent of the position in question and the City of Chicago pays his salary. The right to restoration and reinstatement in the position to which relator claims he is entitled carries with it the right to the salary attached thereto. The omission of a necessary party to a petition for a writ of mandamus appearing on the face of the record would have been grounds for reversal. Powell v. The People, 214 Ill. 475; People v. O'Connell, 252 Ill. 304; People v. Blocki, 203 id. 363.

The principal contention of appellants that a reversal should be granted in this case is based upon the theory that the allegations of the amended petition are insufficient to warrant the relief granted. Owing to the length of this document, we shall undertake to furnish only a brief summary of its allegations, referring only to the salient features thereof. It alleged, in substance, that at the time of the annexation of the City of Lakeview to the City of Chicago in 1889 the relator held the position of Assistant Engineer of the Bureau of Streets in said City of Lakeview and became, by reason of said annexation, an employee of the City of Chicago, being assigned to duty as Assistant Engineer of the Bureau of Streets under the Superintendent of Streets of said City of Chicago in the Department of Public Works thereof; that on or about January 1, 1899, the Civil

Chicago, a municipal corporation, and Julius Dahlman were made parties respondent thereto against whom no relief was granted, and that by reason of this misjoinder of parties the peremptory writ of mandamus cannot issue. That both of those respondents were within the jurisdiction of the trial court is shown by the fact that they were both personally served with summons in this cause. Both of them had an interest in the right or duty sought to be enforced by the writ, that is collaterally determined by the judgment rendered in this cause. Dahlman is the incumbent of the position in question and the City of Chicago pays his salary. The right to reinstatement and reimbursement in the position to which relator claims he is entitled carries with it the right to the salary attached thereto. The omission of a necessary party to a petition for a writ of mandamus appearing on the face of the record would have been grounds for reversal. Powell v. The People, 214 Ill. 479; People v. O'Connell, 252 Ill. 304; People v. Sheets, 203 id. 383.

The principal contention of appellants that a reversal should be granted in this case is based upon the theory that the allegations of the amended petition are insufficient to warrant the relief granted. Owing to the length of this document, we shall undertake to furnish only a brief summary of its allegations, referring only to the salient features thereof. It alleged, in substance, that at the time of the annexation of the City of Lakeview to the City of Chicago in 1889 the relator held the position of assistant engineer of the Bureau of Streets in said City of Lakeview and became, by reason of said annexation, an employee of the City of Chicago, being assigned to duty as Assistant Engineer of the Bureau of Streets under the superintendent of Streets of said City of Chicago in the Department of Public Works thereof; that on or about January 1, 1899, the Civil

Service Commission of the City of Chicago classified that position and place of employment as "Assistant Engineer of the Bureau of Streets;" that on May 9, 1901, the position was placed under the control of the Board of Local Improvements of Chicago, and on December 1, 1901, the title of the position was changed to that of "Assistant Engineer in Charge of Streets;" and again, on December 1, 1903, to that of "Chief Street Engineer" and "Assistant Engineer in Charge of Streets," and again on January 1, 1905, to that of "Chief Street Engineer of the Board of Local Improvements;" that after said original classification the said Civil Service Commission gave notice of an examination to be held for the said position and place of employment known as Assistant Engineer of Bureau of Streets, and thereafter posted an eligible list of those who had successfully passed said examination, upon which the relator stood second; that the person standing at the head of said list refused to accept said position, and thereafter, on May 23, 1899, the relator was regularly and properly certified from said list of eligibles to the position of Assistant Engineer of the Bureau of Streets, and thereupon accepted said position and entered upon the performance of said duties and continued therein until December 31, 1913, when he was promoted by the said Civil Service Commission as hereinafter stated.

The amended petition further alleged that prior to December 5, 1913, the said Civil Service Commission gave notice of a promotional examination to be held of applicants for the position known as Chief Street Engineer of the Board of Local Improvements; that in conformity with the provisions of the Civil Service Act and the rules and regulations of the Civil Service Commission adopted in pursuance thereof, three members of the next lower rank took said promotional examination; that

service commission of the City of Chicago classified that position and place of employment as "Assistant Engineer of the Bureau of Streets;" that on May 5, 1921, the position was placed under the control of the Board of Local Improvements of Chicago, and on December 1, 1921, the title of the position was changed to that of "Assistant Engineer in Charge of Streets;" and again, on December 1, 1922, to that of "Chief street engineer" and "Assistant Engineer in charge of Streets," and again on January 1, 1923, to that of "Chief Street Engineer of the Board of Local Improvements;" that after said original classification the said Civil Service Commission gave notice of an examination to be held for the said position and place of employment known as Assistant Engineer of Bureau of Streets, and thereafter posted an eligible list of those who had actually passed said examination, upon which the relator stood second; that the person standing at the head of said list refused to accept said position, and thereafter, on May 25, 1927, the relator was regularly and properly certified from said list of eligibles to the position of Assistant Engineer of the Bureau of Streets, and thereupon accepted said position and entered upon the performance of said duties and continued thereto until December 31, 1929, when he was promoted by the said Civil Service Commission as hereinafter stated.

The amended petition further alleges that prior to December 5, 1929, the said Civil Service Commission gave notice of a promotional examination to be held of applicants for the position known as Chief Street Engineer of the Board of Local Improvements; that in conformity with the provisions of the Civil Service Act and the rules and regulations of the Civil Service Commission adopted in pursuance thereof, there remains of the next lower rank, said promotional examination; that

petitioner was one of them and that thereafter the Civil Service Commission posted an eligible list of those who successfully passed said examination for the said position of Chief Street Engineer of the Board of Local Improvements, and that relator passed said examination and stood first upon said eligible list, and thereafter, on December 31, 1913, was certified to the position of Chief Street Engineer of the Board of Local Improvements and was immediately appointed to such position by said Board; that relator accepted said position, entered upon and remained in the performance of the duties thereof until December 10, 1915; that the relator faithfully, efficiently and honestly discharged and performed all the duties of said position in its various forms as above stated up to and including December 10, 1915, when he was suspended from said office by the said Board of Local Improvements as the result of a letter from the Civil Service Commission to the said Board, directing that the relator, the respondent Gableman and one Norton be suspended pending an investigation to be held as to mehtods employed in awarding paving contracts; that no investigation was ever conducted relating to the conduct of the relator in his said position by said Civil Service Commission or said Board of Local Improvements. It is not shown whether or not the respondent Gableman, who is the present incumbent of the position, was actually suspended at that time.

The amended petition further alleged that the relator performed the duties of the various positions mentioned from June 20, 1899, until December 10, 1915, when he was suspended by said Board of Local Improvements, and rendered good and efficient service to the said City of Chicago and that during said period he had never violated any provisions of the Civil Service Act or any rules or regulations of the Civil Service

petitioner was one of them and that thereafter the Civil Service Commission posted an eligible list of those who successfully passed said examination for the said position of Chief Street Engineer of the Board of local Improvements, and that relator passed said examination and stood first upon said eligible list, and thereafter, on December 31, 1913, was certified to the position of Chief Street Engineer of the Board of Local Improvements and was immediately appointed to such position by said Board; that relator accepted said position, entered upon and remained in the performance of the duties thereof until December 10, 1918; that the relator faithfully, efficiently and honestly discharged and performed all the duties of said position in the various forms as above stated up to and including December 10, 1918, when he was suspended from said office by the said Board of Local Improvements as the result of a letter from the Civil Service Commission to the said board, alleging that the relator, the respondent Dahlman and one Norton be suspended pending an investigation to be held as to methods employed in awarding paving contracts; that no investigation was ever commenced relating to the conduct of the relator in his said position by said Civil Service Commission or said Board of Local Improvements. It is not shown whether or not the respondent Dahlman, who is the present incumbent of the position, was actually suspended at that time.

The amended petition further alleged that the relator performed the duties of the various positions mentioned from June 20, 1894, until December 10, 1918, when he was suspended by said Board of Local Improvements, and rendered good and efficient service to the said City of Chicago and that during said period he had never violated any provisions of the Civil Service Act or any rules or regulations of the Civil Service

Commission or of the Board of Local Improvements of the City of Chicago; that on December 20, 1915, he sent his resignation to the President of the Board of Local Improvements, which was subsequently withdrawn and cancelled pursuant to the rules of said Commission; and that in conformity with his request contained in said withdrawal of said resignation, a leave of absence was given said petitioner by the said Civil Service Commission for a period of one year from January 19, 1916.

The amended petition further states that on January 19, 1916, before said leave of absence was given relator by said Civil Service Commission, he was informed by them that before they could grant such leave of absence for a year, it would be necessary for relator to file with the Commission a written resignation from the position and place of employment of Chief Street Engineer of the Board of Local Improvements of the City of Chicago, the same to be held by said Commission in conformity, as they stated to him, with Rule VIII of said Commission, but that as a matter of fact, said Rule VIII did not so require and that said Commissioners concealed and withheld the knowledge thereof from relator; that said Civil Service Commission then and there informed him that they could not lawfully and would not under any circumstances grant relator said leave of absence unless he tendered his resignation immediately; that relator protested and objected to tendering such resignation and stated that he merely desired a leave of absence for one year and that he intended to return to work in his said position and place of employment before the expiration of said period of one year, but that said commission again refused to grant said leave of absence for one year unless said tender of resignation was forthcoming from relator immediately, and stated to relator that the tender of such resignation was merely in

Commission or of the Board of Local Improvements of the City of Chicago; that on December 20, 1916, he sent his resignation to the President of the Board of Local Improvements, which was subsequently withdrawn and cancelled pursuant to the rules of said Commission; and that in conformity with his request contained in said withdrawal of said resignation, a leave of absence was given said petitioner by the said Civil Service Commission for a period of one year from January 19, 1916.

The amended petition further states that on January 19, 1916, before said leave of absence was given relator by said Civil Service Commission, he was informed by them that before they could grant such leave of absence for a year, it would be necessary for relator to file with the Commission a written resignation from the position and place of employment of Chief Street Engineer of the Board of Local Improvements of the City of Chicago, the same to be held by said Commission in conformity, as they stated to him, with Rule VIII of said Commission, but that as a matter of fact, said Rule VIII did not so require and that said Commissioners concealed and withheld the knowledge thereof from relator; that said Civil Service Commission then and there informed him that they could not legally and would not under any circumstances grant relator said leave of absence unless he tendered his resignation immediately; that relator protested and objected to tendering such resignation and stated that he merely desired a leave of absence for one year and that he intended to return to work in his said position and place of employment before the expiration of said period of one year, but that said Commission again refused to grant said leave of absence for one year unless said tender of resignation was forthcoming from relator immediately, and stated to relator that the tender of such resignation was merely in

conformity with the custom of the Civil Service Commission and that it would not affect relator's right to be immediately restored to his said position and place of employment if he made application for reinstatement to said commission at any time before the expiration of said leave of absence.

The amended petition further states that at said time relator was totally ignorant of the provisions of said Rule VIII of said Commission and said Civil Service Commission being his superior and having complete jurisdiction over the granting of leave of absence and reinstatement of him in said position, and acting in a position of public trust, relator placed full confidence in and believed to be true the statements made by the said commission as to the necessity of tendering his resignation as a condition precedent to obtaining his leave of absence, and that relying upon the statements of said Civil Service Commission, he tendered his resignation January 19, 1916, and was thereupon granted a leave of absence for one year from January 19, 1916; that relator never intended or desired at any time to leave his position as Chief Street Engineer for the Board of Local Improvements of the City of Chicago, but on the contrary desired to continue in his work; that at the time he made said application for said leave of absence it was well known by said Civil Service Commission that said Rule VIII did not require the resignation of said relator before said leave of absence could be granted; that said resignation has been in the possession of said Civil Service Commission since January 16, 1916, but has never been filed.

The amended petition further alleged that relator's suspension on December 10, 1915, by said Civil Service Commission and the demand and coercion by said Commission in obtaining relator's resignation contemporaneously with the

contemporaneously with the action of the Civil Service Commission and that it would not affect relator's rights to be immediately restored to his said position and place of employment if he made application for reinstatement to said commission at any time before the expiration of said leave of absence.

The amended petition further states that at said time relator was totally ignorant of the provisions of said Rule VIII of said Commission and said Civil Service Commission being his superior and having complete jurisdiction over the granting of leave of absence and reinstatement of him in said position, and acting in a position of public trust, relator placed full confidence in and believed to be true the statements made by the said commission as to the necessity of tendering his resignation as a condition precedent to obtaining his leave of absence, and that relying upon the statements of said Civil Service Commission, he tendered his resignation January 19, 1916, and was thereupon granted a leave of absence for one year from January 19, 1916; that relator never intended or desired at any time to leave his position as Chief Street Engineer for the Board of Local Improvements of the City of Chicago, but on the contrary desired to continue in his work; that at the time he made said application for said leave of absence it was well known by said Civil Service Commission that said rule VIII did not require the resignation of said relator before said leave of absence could be granted; that said resignation has been in the possession of said Civil service Commission since January 19, 1916, but has never been filed.

The amended petition further alleged that relator's suspension on December 10, 1918, by said Civil service Commission and the demand and coercion by said Commission in obtaining relator's resignation contemporaneously with the

granting of said leave of absence on January 19, 1916, were not in good faith, but were fraudulently made to the prejudice of relator's rights in the premises and not for the purpose of investigating the conduct and action of relator in his said position, but were merely pretexts and the beginning of other fraudulent and unlawful acts and doings in attempting to deprive relator of his said position in order that they might fill the same contrary to the provisions of the Civil Service Act and the rules of said Commission; that on and since December 10, 1915, there has never been any lack of funds with which to pay the salary of relator in said position; that each year since January 1, 1905, inclusive, when the title to relator's said position was changed to that of "Chief Street Engineer for the Board of Local Improvements of the City of Chicago," the City Council of said city has in its annual appropriation bill appropriated money for the payment of the salary incidental to said position, except in the year 1916, when no appropriation was made, for the reason that relator was on said leave of absence, the last of these appropriations being on March 31, 1920, whereby the City Council appropriated the sum of $4200 as salary for said position; that on September 19, 1916, the relator made written application to said Civil Service Commission and said Board of Local Improvements for reinstatement and requested them and each of them to restore his name to the eligible list as provided by the rules of said Civil Service Commission, which gave to relator precedence for reinstatement; that in response to his communication the President of the Board of Local Improvements on September 23, 1916, informed him by written communication that his application for reinstatement had been referred to the Civil Service Commission; that in addition to his written re-request for reinstatement he made numerous requests of the

granting of said leave of absence on January 13, 1916, were not in good faith, but were fraudulently made to the prejudice of relator's rights in the premises and not for the purpose of investigating the conduct and action of relator in his said position, but were merely pretexts and the beginning of other fraudulent and unlawful acts and doings in attempting to deprive relator of his said position in order that they might fill the same contrary to the provisions of the Civil Service Act and the rules of said Commission; that on and since December 10, 1915, there has never been any fund of funds with which to pay the salary of relator in said position; that each year since January 1, 1908, inclusive, when the title to relator's said position was changed to that of "Chief Street Engineer for the Board of Local Improvements of the City of Chicago," the City Council of said city has in its annual appropriation bill appropriated money for the payment of the salary incidental to said position, except in the year 1916, when no appropriation was made, for the reason that relator was on said leave of absence, the last of these appropriations being on March 31, 1916, whereby the City Council appropriated the sum of $3600 as salary for said position; that on September 10, 1916, the relator made written application to said Civil Service Commission and said board of Local Improvements to reinstatement and requested them and each of them to restore his name to the eligible list as provided by the rules of said Civil Service Commission, which gave to relator preference for reinstatement; that in response to his communication the President of the Board of Local Improvements on September 25, 1916, informed him by written communication that his application for reinstatement had been referred to the Civil Service Commission; that in addition to his written request for reinstatement he made numerous requests of the

Civil Service Commission and the Board of Local Improvements personally from that time until filing the petition herein for reinstatement in his said position, approximately ten times and upon an average of at least two times every year, but that the Civil Service Commission refused to reinstate him, with the fraudulent intent of preventing relator from performing the duties of said position and place of employment and from earning the salary he would thereby receive for which the appropriation had been made.

The relator further alleged that ever since September 19, 1916, continuously, up to the time of filing his petition, personally and through his attorney he has had numerous conferences relative to his reinstatement in said position with said Board of Local Improvements and with said Civil Service Commission, wherein the right of the relator to said position was discussed, but that he could never obtain from said Commission the statement of any definite reason for the refusal to so reinstate him, and he was led thereby to believe during all of said period that he would be reinstated to his said position, by reason whereof the relator refrained from filing his petition for a writ of mandamus prior to this time; that it was understood and agreed by and between him and said Civil Service Commissioners that said meetings and conferences were held for the purpose of obtaining a settlement and satisfaction of the matters before mentioned without resorting to litigation and that during the pendency of said negotiations the said Civil Service Commission did not at any time deny the right of relator to be reinstated in said position, but on the contrary, at all times recognized relator's right to reinstatement and informed him that they would repair the wrong and injury suffered by him and cause him to be reinstated and compensated therefor, but that finally becoming

Civil Service Commission and the Board of Local Improvements personally from that time until filing the petition herein for reinstatement in his said position, approximately ten times and upon an average of at least two times every year, but that the Civil Service Commission refused to reinstate him, with the fraudulent intent of preventing relator from performing the duties of said position and place of employment and from earning the salary he would thereby receive for which the appropriation had been made.

The relator further alleged that ever since September 10, 1918, continuously, up to the time of filing his petition, personally and through his attorney he has had numerous conference relative to his reinstatement in said position with said Board of Local Improvements and with said Civil Service Commission, wherein the right of the relator to said position was discussed, but that he could never obtain from said Commission the statement of any definite reason for the refusal to so reinstate him, and he was led thereby to believe during all of said period that he would be reinstated to his said position, by reason whereof the relator refrained from filing his petition for a writ of mandamus prior to this time; that it was understood and agreed by and between him and said Civil Service Commissioners that said meetings and conferences were held for the purpose of obtaining a settlement and satisfaction of the matters before mentioned without resorting to litigation and that during the pendency of said negotiations the said Civil Service Commission did not at any time deny the right of relator to be reinstated in said position, but on the contrary, at all times recognized relator's right to reinstatement and informed him that they would repair the wrong and injury suffered by him and cause him to be reinstated and compensated therefor, but that finally becoming

uneasy and fearing that his rights might be jeopardized by the delay, the relator became convinced that he could obtain reinstatement in his said position only by process of law and commenced this action.

It further appears from the amended petition that immediately after a leave of absence was granted to the relator as above stated, the Civil Service Commissioners designated the respondent Julius Gableman, whose suspension was directed by the letter of the Civil Service Commission of December 10, 1915, to perform the duties pertaining to the position of Chief Street Engineer for the Board of Local Improvements; that the appointment of Gableman was temporary, but that ever since said time he has been performing the duties of said position to the prejudice of relator's rights with the knowledge and consent of both the Civil Service Commission and the Board of Local Improvements and in fraud of relator's rights and interest in and to said place of employment and the compensation therefor and in violation of the rules of said Civil Service Commission, and that the said Commission and said Board are paying said Gableman for performing the duties of said position out of the fund appropriated by the City Council for the salary pertaining thereto; that said Gableman is not entitled to said position and is performing the duties thereof in violation of the provisions of the Civil Service law and the rules of the Commission; that on September 19, 1916, being the date on which relator made application for reinstatement and prior thereto, no requisition had been made for certification to fill the alleged vacancy in the said position or place of employment; that said Gableman was merely a temporary appointee under the rules of said Commission, and that the present Civil Service Commission and the present Board of Local Improvements have refused to permit relator to perform the duties of said

money and fearing that his rights might be jeopardized by the delay, the relator became convinced that he could obtain reinstatement in his said position only by process of law and commenced this action.

It further appears from the amended petition that immediately after a leave of absence was granted to the relator as above stated, the Civil Service Commissioners designated the respondent Julius Gehlsen, whose suspension was directed by the letter of the Civil Service Commission of December 10, 1913, to perform the duties pertaining to the position of Chief Street Engineer for the Board of Local Improvements; that the appointment of Gehlsen was temporary, but that over since said time he has been performing the duties of said position to the prejudice of relator's rights with the knowledge and consent of both the Civil Service Commission and the Board of Local Improvements and in fraud of relator's rights and interest in and to said place of employment and the compensation therefor and in violation of the rules of said Civil Service Commission, and that the said Commission and said Board are paying said Gehlsen for performing the duties of said position out of the fund appropriated by the City Council for the salary pertaining thereto; that said Gehlsen is not entitled to said position and is performing the duties thereof in violation of the provisions of the Civil Service law and the rules of the Commission; that on September 10, 1914, being the date on which relator made application for reinstatement and order thereto, no requisition had been made for certification to fill the alleged vacancy in the said position or place of employment; that said Gehlsen was merely a temporary appointee under the rules of said Commission, and that the present Civil Service Commission and the present Board of Local Improvements have refused to permit relator to perform the duties of said

position and have continued in such refusal ever since September 19, 1916, although relator has been at all times willing, able and anxious to perform the duties thereof in conformity with the Civil Service Act and the rules of said Civil Service Commission and said Board of Local Improvements.

The prayer of the petition is that the present Civil Commission and the Board of Local Improvements of the City of Chicago be directed to forthwith restore relator to the said position of Chief Street Engineer for the Board of Local Improvements of the City of Chicago, to the end that relator may at once enter upon and discharge the duties thereof and that his name be entered and placed immediately upon the proper roster and payroll of said City of Chicago, with the same right to continue in the performance of the duties of said position and receive the salary therefor as he would be entitled to receive had he not been denied reinstatement in the said position on and since September 19, 1916, and subject to the laws, rules and ordinances pertaining to said position and without prejudice to the relator's right to seek in other appropriate legal action, proper remedy for the recovery of all salary due him from said city for failure to reinstate and permit him to enter upon and discharge the duties of said position since September 19, 1916.

In support of its contention that the allegations of the amended petition are not sufficient to justify the relief granted, appellants rely upon certain fundamental propositions, contending that the writ of mandamus will be awarded only in case the petitioner shows a clear right to the writ and a clear neglect of duty on the part of defendant to perform the act sought to be enforced, citing People v. City of Chicago, 280 Ill. 576, People v. Brentano, 259 id. 359, and other cases of similar import; that a person seeking reinstatement to a position in the classified service by a writ of mandamus must

position and have continued in such refusal ever since September 19, 1916, although relator has been at all times willing, able and anxious to perform the duties thereof in conformity with the Civil Service Act and the rules of said Civil Service Commission and said Board of Local Improvements.

The prayer of the petition is that the present Civil Commission and the Board of Local Improvements of the City of Chicago be directed to forthwith restore relator to the said position of Chief Street Engineer for the Board of Local Improvements of the City of Chicago, to the end that relator may at once enter upon and discharge the duties thereof and that his name be entered and placed immediately upon the proper roster and payroll of said City of Chicago, with the same right to continue in the performance of the duties of said position and receive the salary therefor as he would be entitled to receive had he not been denied reinstatement in the said position on and since September 19, 1916, and subject to the laws, rules and ordinances pertaining to said position and without prejudice to the relator's right to seek in other appropriate legal action, proper remedy for the recovery of all salary due him from said city for failure to reinstate and permit him to enter upon and discharge the duties of said position since September 19, 1916.

In support of its contention that the allegations of the amended petition are not sufficient to justify the relief granted, appellants rely upon certain fundamental propositions, contending that the writ of mandamus will be awarded only in case the petitioner shows a clear right to the writ and a clear neglect of duty on the part of defendant to perform the act sought to be enforced, citing People v. City of Chicago, 200 Ill. 276, People v. Brentano, 229 id. 380, and other cases of similar import; that a person seeking reinstatement to a position in the classified service by a writ of mandamus must

show the legal existence of the position and his right thereto de jure as distinguished from de facto, citing People v. Coffin, 282 Ill. 599, People v. Coffin, 279 id. 401, and Gersch v. City, 250 id. 551, which discuss the distinction to be observed between an office and a place of employment and the relative rights of de jure and de facto officers. There is no dispute about these general principles, but we are of the opinion that the case made by the amended petition herein fully complies with the conditions stated in the foregoing authorities, so far as they are applicable to the present case. The amended petition shows that the relator refers continually to his employment as a position or place of employment and not as an office. The legal existence of the position of Chief Street Engineer was fully shown by the amended petition, which prayed for reinstatement to a position and not an office. People v. Coffin, 282 Ill. 599.

The pleading of ultimate facts in the petition was sufficient and it was not necessary to plead probative or evidentiary facts. The claim that the relator was guilty of laches in asserting his rights cannot be sustained, in view of the fact that he was prevented from discovering the fraud perpetrated upon him through his confidence in the Civil Service Commission. In such case laches begins to run only from the discovery of the fraud when it becomes known to the party instituting the action. Keithly v. Mutual Life Ins. Co., 271 Ill. 594; Ware v. Law, 214 Ill. App. 8. The relator delayed filing his petition on account of the elusive assurances given by the Civil Service Commission as to his reinstatement. Under such circumstances, the doctrine of laches cannot be invoked to deprive relator of the protection afforded by the Civil Service Act.

show the legal existence of the position and his right thereto de jure as distinguished from de facto, citing People v. Coffin, 282 Ill. 599, People v. Coffin, 276 id. 401, and Gerson v. City, 280 id. 651, which discuss the distinction to be observed between an office and a place of employment and the relative rights of de jure and de facto officers. There is no dispute about these general principles, but we are of the opinion that the case made by the amended petition herein fully complies with the conditions stated in the foregoing authorities, supra as they are applicable to the present case. The amended petition shows that the relator refers continually to his employment as a position or place of employment and not as an office. The legal existence of the position of Chief Street Engineer was fully shown by the amended petition, which proved for relator's part to a position and not an office. People v. Coffin, 282 Ill. 599.

The pleading of ultimate facts in the petition was sufficient and it was not necessary to plead probative or evidentiary facts. The claim that the relator was guilty of laches in asserting his rights cannot be sustained, in view of the fact that he was prevented from discovering the fraud perpetrated upon him through his confidence in the civil service Commission. In such case laches begins to run only from the discovery of the fraud when it becomes known to the party instituting the action. Cutting v. Mutual Life Ins. Co., 271 Ill. 594; Kane v. Lam, 214 Ill. App. 6. The relator delayed filing his petition on account of the clearly mistaken given by the Civil Service Commission as to his retirement. Under such circumstances, the doctrine of laches cannot be invoked to deprive relator of the protection afforded by the Civil Service Act.

We are of the opinion that the material allegations to the amended petition summarized above, which are admitted to be true, show that relator is entitled to reinstatement in his said position as directed by the writ of mandamus issued herein.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

We are of the opinion that the material allegations to the amended petition numerated above, which are admitted to be true, show that relator is entitled to reinstatement in his said position as directed by the writ of mandamus issued herein.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

Barnes, J., and Gridley, J., concur.

204 - 27680.

T. BARRETT SMITH,
Appellee,

vs.

JOHN RODGERS and HARRY HARRIS,
co-partners, doing business as
HARRIS & RODGERS,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

227 I.A. 608

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County upon a verdict of the jury in favor of plaintiff, who is appellee, and against defendants, who are appellants, in the sum of $1200. The action is based upon the sale by defendants to plaintiff of a second hand automobile. It is charged by plaintiff that the sale was procured by means of false representations made by defendants to the effect that the automobile in question was a current model, a $10,000 Locomobile Sportiff and in perfect mechanical condition. The declaration contained twenty-one counts, which in substance alleged that defendants fraudulently and falsely warranted the automobile in question to be an absolutely perfect current model $10,000 Locomobile Sportiff; that defendants knew the falsity of said warranties and made the same for the purpose of inducing plaintiff to purchase; that plaintiff relied upon said warranties in his purchase of the automobile in question. A plea of the general issue was filed.

A reversal is sought upon the ground that the verdict and judgment were contrary to the law and the evidence; that the court made improper remarks in the presence of the jury which were prejudicial to defendants, and that the court erred in refusing to give certain instructions requested on behalf of defendants.

The question as to whether or not the evidence was sufficient to sustain the verdict is not open to review in the present case for the reason that the bill of exceptions does not show a motion for a new trial, an order overruling the motion and an exception to such ruling. C. B. & Q. R. R. Co. v. Haselwood, 194 Ill. 69. Before an appellate court can consider any question of the sufficiency of evidence, it is necessary that a motion for a new trial should have been made and overruled and an exception preserved to the order overruling that motion. Yarber v. Chicago & Alton Ry. Co., 235 Ill. 597, citing numerous authorities.

Appellants contend that the judgment is contrary to the law, for the reason that the declaration and each of its counts charges defendants with having deceitfully sold the automobile in question to plaintiff, while the evidence tends to show a breach of warranty only. In other words, appellants say that there was a variance between the declaration and the proof. This contention was waived by defendants, so that it cannot now be considered as a ground for reversal, for the reason that the bill of exceptions contains no objections to the admission or exclusion of evidence on the ground of variance (City of Joliet v. Johnson, 177 Ill. 178; Probst Construction Co. v. Foley, 156 id. 31), and no motion to exclude evidence on that ground. Gascoigne v. Metropolitan West Side Elevated Co., 239 Ill. 18. The declaration sufficiently charged a breach of warranty, so that there was no variance between it and the proof regardless of the fact that no objections to the admission of evidence and no motion to exclude were made upon that ground.

The written contract between the parties was immaterial, and therefore inadmissible in evidence. Consequently the rulings of the court as to the legal effect of certain of its provisions cannot be urged as grounds for a reversal. The action

The question as to whether or not the evidence was sufficient to sustain the verdict is not open to review in the present case for the reason that the bill of exceptions does not show a motion for a new trial, an order overruling the motion and an exception to such ruling. C. S. § 2- 1- 20. v. Hazelwood, 194 Ill. 49. Before an appellate court can consider any question of the sufficiency of evidence, it is necessary that a motion for a new trial should have been made and overruled and an exception preserved to the order overruling that motion. Yerkes v. Chicago & Alton Ry. Co., 283 Ill. 387, citing numerous authorities.

Appellants contend that the judgment is contrary to the law, for the reason that the domination and sway of its counsel charged defendants with having associiatly sold the automobile in question to plaintiff, while the evidence tends to show a breach of warranty only. In other words, appellants say that there was a variance between the declaration and the proof. This contention was waived by defendants, so that it cannot now be considered as a ground for reversal, for the reason that the bill of exceptions contains no objections to the admission or exclusion of evidence on the ground of variance (Ely of Joliet v. Johnson, 177 Ill. 178; Crobat Construction Co. v. Ching, 108 Ill. 31), and no motion to exclude evidence on that ground. Consolidated v. Metropolitan Seat Ride Journal Co., 256 Ill. 16. The declaration artificially charged a breach of warranty, so that there was no variance between it and the proof regardless of the fact that no objections to the admission of evidence and no motion to exclude were made upon that ground.

The written contract between the parties is immaterial, and therefore immaterial also in evidence. Consequently, the judge of the court as to the legal effect of certain of the provisions cannot be urged as grounds for reversal. The motion

was not brought upon the contract but upon the false representations and warranties which were employed to induce plaintiff to make the purchase whereby he was damaged. Such an action will lie, even though the parties may have entered into a written agreement containing a stipulation upon the point covered by the misrepresentations. The fraud is not merged or extinguished by the covenant, but affords additional and more complete remedy to the party. Antle & Bros v. Sexton, 137 Ill. 410.

Our attention has not been called to any specific remarks of the court which were improper and prejudicial to defendants. The general statement is made that the words employed by the court concerning the effect of certain provisions of the contract were prejudicial. As we have already indicated, the contract in question was immaterial to the issues raised by the pleading. The defendants could not have been prejudiced by any remarks of the court with reference thereto.

Appellants have assigned as error that certain instructions offered by defendants were refused, without indicating in any way the particular instructions to which reference is made. While this point is made in the brief, it is not argued by counsel and is therefore waived under the rules of this court. The instructions which are attached to the record are not made a part of the bill of exceptions and therefore cannot be considered. C. B. & Q. R. R. Co. v. Haselwood, supra; E. St. Louis El. Rwy. Co. v. Stout, 150 Ill. 9.

For the reasons above indicated, the judgment of the Superior Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

was not brought upon the contract but upon the false representations and warranties which were employed to induce plaintiff to make the purchase whereby he was damaged. Such an action will lie, even though the parties may have entered into a written agreement containing a stipulation upon the point covered by the misrepresentations. The fraud is not merged or extinguished by the covenant, but affords additional and more complete remedy to the party. Ashlo & Zroe v. Jackson, 1NY 111. 410.

Our attention has not been called to any specific remarks of the court which were improper and prejudicial to defendants. The general statement is made that the words employed by the court concerning the effect of certain provisions of the contract were prejudicial. We do more fully indicated, the contract in question was introduced to the jurors rather by the pleading. The defendants could not have been prejudiced by any remarks of the court with reference thereto.

Appellants have analyzed so much that certain instructions offered by defendants were refused, without indicating in any way the particular instructions to which reference is made. While this point is made in the brief, it is not argued by counsel and is therefore waived under the rules of this court. The instructions which are attached to the record are not made a part of the bill of exceptions and therefore cannot be considered. G. R. I. R. R. Co. v. Henderson, supra; M. St. Louis Rl. Ry. Co. v. Stone, 1Ro 111. 9.

For the reasons above indicated, the judgment of the Superior Court is affirmed.

Affirmed.

Barnes, J., and Gridley, J., concur.

216 - 27692.

CHARLES BORGE, et al.,
Appellees,

vs.

JOHN E. TILLOTSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

227 I.A. 308

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County directing that a certain lease purporting to have been executed by one Mary Leavitt, now deceased, to the appellant, John E. Tillotson, of the premises Number 4513 Indiana Avenue in Chicago, be surrendered and cancelled as a cloud upon the title of complainant, who is appellee here, and for the surrender of possession of said premises to one Susie May, the cross-complainant.

The record shows that on May 24, 1919, complainant purchased from the executor of the last will and testament of Mary Leavitt, deceased, the premises above mentioned, subject to leases expiring April 30, 1920. He acquired title by executor's deed and a warranty deed from the sole heir of said decedent. At the same time, the executor delivered to complainant three leases from Mary Leavitt to the appellant, Tillotson, two of which expired April 30, 1920, being respectively for the first and second flats, and the other expiring September 30, 1920, for the third flat in said building; also an order on the tenant Tillotson to pay rent to complainant under the three leases above mentioned, commencing July 1, 1919. The complainant exhibited these leases and the above mentioned order to Mrs. Tillotson, the wife of appellant, who thereupon paid to complainant the rent, amounting to $122.50, for the month of July, 1919. Subsequently com-

516 - 2723.

CHARLES BOXER, et al.,
Appellees,

vs.

JOHN K. TILLOTSON,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County directing that a certain lease purporting to have been executed by one Mary Leavitt, now deceased, to the appellant, John K. Tillotson, of the premises Number 4213 Indiana Avenue in Chicago, be surrendered and cancelled as a cloud upon the title of complainant, who is appellee here, and for the surrender of possession of said premises to one Nels May, the cross-complainant.

The record shows that on May 24, 1919, complainant purchased from the executor of the last will and testament of Mary Leavitt, deceased, the premises above mentioned, subject to leases expiring April 30, 1920. He acquired title by executor's deed and a warranty deed from the sole heir of said decedent. At the same time, the executor delivered to complainant three leases from Mary Leavitt to the appellant, Tillotson, two of which expired April 30, 1920, being respectively for the first and second flats, and the other expiring September 30, 1920, for the third flat in said building; also an order on the tenant Tillotson to pay rent to complainant under the terms leases above mentioned, commencing July 1, 1919. The complainant notified those lessee and the above mentioned order to Mr. Tillotson, the wife of appellant, who thereupon paid to complainant the rent, amounting to $128.50, for the month of July, 1919. Thereafter, com-

plainant sold the building to Susie May, subject to leases expiring April 30, 1920, and upon the delivery of an agreement for a deed of the premises, he assigned and delivered to her the above mentioned leases. There is evidence in the record tending to show that Susie May, the new owner, exhibited the leases to Mrs. Tillotson, who paid rent to Susie May for the months of August and September, 1919, at the rate of $122.50 per month, being the amount of rental specified in the three leases.

Thereafter, on August 7, 1919, the appellant, Tillotson, caused to be recorded in the office of the Recorder of Cook County, Illinois, a document purporting to be a lease of the entire premises for a term commencing May 1, 1919, and expiring April 30, 1922. Said lease bears date May 1, 1919, and purports to have been executed by said Mary Leavitt, who died April 1, 1919. The rent reserved is $122.50 per month, being the same amount specified in the three leases above mentioned, but made payable in three instalments of $35, $45 and $42.50 respectively on the 5th, 15th and 22nd of each month in advance. Commencing with October 1, 1919, Tillotson claimed to be holding possession of said premises under the last mentioned lease. Thereafter the complainant having been served with a notice by Susie May, the purchaser, to fulfill the terms of his contract for a warranty deed, filed the bill of complaint herein to cancel the said lease expiring April 30, 1922, as a cloud on his title, alleging as a ground for the relief sought that the purported signature of Mary Leavitt attached thereto was a forgery and that as against the complainant and his purchaser, Susie May, the appellant Tillotson was estopped to assert the validity of said lease by reason of his payment of rent under the three leases above mentioned. Subsequently Susie May, who was a defendant in

plaintiff sold the building to Susie May, subject to leases expiring April 30, 1920, and upon the delivery of an agreement for a deed of the premises, he assigned and delivered to her the above mentioned leases. There is evidence in the record tending to show that Susie May, the new owner, exhibited the leases to Mrs. Tillotson, who paid rent to Susie May for the months of August and September, 1919, at the rate of $128.50 per month, being the amount of rental specified in the three leases.

Thereafter, on August 7, 1919, the appellant, Tillotson, caused to be recorded in the office of the Recorder of Cook County, Illinois, a document purporting to be a lease of the entire premises for a term commencing May 1, 1919, and expiring April 30, 1922. Said lease bore date May 1, 1919, and purports to have been executed by said Mary Lesnitt, who died April 1, 1919. The rent reserved is $128.50 per month, being the same amount specified in the three leases above mentioned, but made payable in three instalments of $38, $40 and $42.50 respectively on the 5th, 15th and 25th of each month in advance. Commencing with October 1, 1919, Tillotson claimed to be holding possession of said premises under the last mentioned lease. Thereafter the complainant having been served with a notice by Susie May, the defendant, to fulfill the terms of his contract for a warranty deed, filed his bill of complaint herein to quiet the said lease expiring April 30, 1922, as a cloud on his title, alleging as a ground for the relief sought that the purported signature of Mary Lesnitt attached thereto was a forgery and that he relied the complainant and his predecessor, Susie May, the appellant Tillotson was estopped to assert the validity of said lease by reason of his payment of rent under the three leases above mentioned. Subsequently Susie May, who was a defendant in

the original bill, filed her cross-bill asking the same relief as the original bill and for an injunction against the forfeiture of the contract and for the appointment of a receiver to collect the rents pending the termination of the controversy. The injunction was granted and a receiver appointed. The allegations of the bill and cross-bill were denied by the appellant Tillotson. A further review of the pleadings is unnecessary.

The case was referred to a master in chancery to take proofs and report his conclusions. The master's report was filed, which was subsequently approved by the chancellor. The final decree, entered December 19, 1921, found the facts substantially as above stated, and further found that the appellant Tillotson is in possession of the premises under the three leases first above mentioned and that the cross-complainant, Susie May, is entitled to the immediate possession of the entire premises; that the document purporting to be a lease of the entire premises for the period beginning May 1, 1919, and expiring April 30, 1922, under which Tillotson and his wife claim possession of the premises, does not bear the genuine signature of Mary Leavitt, the lessor therein named; that the same was not signed at the time or under the conditions claimed by appellants, and that said last mentioned document is a cloud upon the title of complainant and the interests of the cross-complainant. The decree ordered that said last mentioned lease be delivered up and cancelled as a cloud on complainant's title; that the defendant Tillotson immediately surrender possession of the premises to the cross-complainant, Susie May, and in default of so doing, that a writ of assistance issue.

Appellant has assigned numerous errors, many of which are not argued in his brief, and therefore must be regarded as waived under the rules of this court. Lorenzo v. Hunter, 185

the original bill, filed her cross-bill asking the same relief as the original bill and for an injunction against the forfeiture of the contract and for the appointment of a receiver to collect the rents pending the termination of the controversy. The injunction was granted and a receiver appointed. The allegations of the bill and cross-bill were denied by the appellant Hillstom. A further review of the pleadings is unnecessary.

The case was referred to a master in chancery to take proofs and report his conclusions. The master's report was filed, which was duly approved by the chancellor. The final decree, entered December 19, 1921, found the facts substantially as above stated, and further found that the appellant Hillstom is in possession of the premises under the three leases first above mentioned and that the cross-complainant, Bertie May, is entitled to the immediate possession of the entire premises; that the document purporting to be a lease of the entire premises for the period beginning May 1, 1918, and expiring April 30, 1922, under which Hillstom and his wife claim possession of the premises, does not bear the genuine signature of Mary Lavell; the lessor therein named; that the same was not signed at the time or under the conditions claimed by appellants, and that said instrumental document is a cloud upon the title of complainant and the interests of the cross-complainant. The decree ordered that said instrumental lease be delivered up and cancelled as a cloud on complainant's title; that the defendant Hillstom immediately surrender possession of the premises to the cross-complainant, Bertie May, and in default of so doing, that a writ of possession issue.

Appellant has assigned numerous errors, many of which are not argued in his brief, and therefore must be regarded as waived under the rules of this court. Lorenzo v. Hunter, 183

Ill. App. 574; Decker v. Braverman, 196 id. 387. It is contended by appellant that the finding is contrary to the evidence, but he has failed to indicate the facts shown by the evidence upon which he relies, and has made no reference to the pages of the abstract on which they may be found. The court cannot be required to search the record to determine whether or not the conclusions of counsel as to the weight of evidence are correct. Town of Western Mound v. Loper, 185 Ill. App. 60. The same is true as to certain alleged erroneous rulings of the court, which for the same reason cannot be reviewed. Wolf v. Ellison, 201 Ill. App. 38.

In this case there was a finding of facts by the master which was approved by the chancellor, and therefore must be regarded as conclusive upon the appellant, unless it can be said that the decree was clearly and palpably contrary to the manifest weight of the evidence. Williams v. Lindblom, 163 Ill. 346; Siegel v. Andrews & Co., 181 id. 350; Treloar v. Hamilton, 225 id. 102; North Side Sash and Door Co. v. Recht, 295 id. 515. The evidence as to the alleged forgery was conflicting, but we cannot say that the findings of the master, which were approved by the chancellor and set forth at length in the final decree, were contrary to the manifest weight of the evidence.

If it had been the intention of the appellant Tillotson to rely upon the purported lease of May 1, 1919, he should have made known the fact at the earliest possible opportunity. Instead of doing so, he elected to recognize the three prior leases as being in full force and effect by paying rent in accordance with their terms to two different assignees of said leases. In doing so he attorned to both complainant and cross-

III. App. 574; Dooley v. Stevenson, 108 id. 387. It is contended by appellant that the finding is contrary to the evidence, but he has failed to indicate the facts shown by the evidence upon which he relies, and has made no reference to the pages of the abstract on which they may be found. The court cannot be required to search the record to determine whether or not the conclusions of counsel as to the weight of evidence are correct. Town of Western Mound v. Loper, 188 Ill. App. 80. The same is true as to certain alleged erroneous rulings of the court, which for the same reason cannot be reviewed. Hall v. Hallion, 201 Ill. App. 58.

In this case there was a finding of facts by the master which was approved by the chancellor, and therefore must be regarded as conclusive upon the appellant, unless it can be said that the decree was clearly and palpably contrary to the manifest weight of the evidence. Williams v. Lindblom, 182 Ill. 345; Hagel v. Anderson & Co., 181 id. 380; Trafcoff v. Hamilton, 238 id. 108; North Side Sash and Door Co. v. Booth, 292 id. 518. The evidence as to the alleged forgery was conflicting, but we cannot say that the findings of the master, which were approved by the chancellor and set forth at length in the final decree, were contrary to the manifest weight of the evidence.

If it had been the intention of the appellant trustee to rely upon the purported issue of May 1, 1934, he should have made known the fact at the earliest possible opportunity.

Instead of doing so, he attempts to reconstruct the issue prior leases as being in full force and effect by saying that in accordance with their terms to two different residences of said lessee. In doing so he attempts to both complainant and cross-

complainant, and cannot be permitted to assert as against them, any rights claimed to have been acquired under the alleged lease of May 1, 1919. Having failed to speak when equity and good conscience required it, he should not be heard now. Lloyd v. Lee, 45 Ill. 277.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

complainant, and cannot be permitted to assert as against them, any rights claimed to have been acquired under the alleged lease of May 1, 1919. Having failed to speak when equity and good conscience required it, he should not be heard now.

Floyd v. Lee, 45 Ill. 277.

The decree of the Circuit Court is affirmed.

AFFIRMED.

Barnes, P. J., and Friday, J., concur.

229 - 27705

ALEXANDER HAMILTON, Appellee, vs. FRED W. UPHAM, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit brought by Alexander Hamilton, plaintiff and appellee here, against Fred W. Upham and others to recover damages for injuries sustained while plaintiff was working upon a lumber pile belonging to two of the original defendants located in a lumber yard in Chicago and leased to a third party. The suit was originally brought against Fred W. Upham and Oliver O. Agler, doing business as Upham & Agler, and William C. Schreiber and Frank J. Swec, doing business as William C. Schreiber & Company. Prior to the trial the suit was dismissed as to the defendants Schreiber and Swec. The death of defendant Agler was suggested and the trial proceeded against the defendant Fred W. Upham, who is appellant here. There was a verdict and judgment of $5,000 in favor of plaintiff, from which defendant has appealed.

The amended declaration consisted of three counts, to which defendant pleaded the general issue and a special plea of non-ownership, operation and control. The declaration charged, in substance, that on May 11, 1914, the date of the accident, defendant was the owner of a pile of lumber located in a lumber yard at Throop and Twenty-second streets in Chicago, which was being removed from the yard, and that

329 - 27708

ALEXANDER HAMILTON,
Appellee,

vs.

FRED W. UPHAM,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This is a personal injury suit brought by Alexander Hamilton, plaintiff and appellee here, against Fred W. Upham and others to recover damages for injuries sustained while plaintiff was working upon a lumber pile belonging to two of the original defendants located in a lumber yard in Chicago and leased to a third party. The suit was originally brought against Fred W. Upham and Oliver C. Agler, doing business as Upham & Agler, and William C. Schreiber and Frank J. Swee, doing business as William C. Schreiber & Company. Prior to the trial the suit was dismissed as to the defendants Schreiber and Swee. The death of defendant Agler was suggested and the trial proceeded against the defendant Fred W. Upham, who is appellant here. There was a verdict and judgment of $8,000 in favor of plaintiff, from which defendant has appealed.

The amended declaration consisted of three counts, to which defendant pleaded the general issue and a special plea of non-ownership, operation and control. The declaration charged, in substance, that on May 11, 1914, the date of the accident, defendant was the owner of a pile of lumber located in a lumber yard at Throop and Twenty-second streets in Chicago, which was being removed from the yard, and that

while plaintiff was working for defendant in measuring the lumber, pursuant to the direction of defendant's foreman, another pile of lumber next to the pile on which plaintiff was working suddenly gave way and fell upon plaintiff by reason of the negligent manner in which it had been piled; that defendant knew, or in the exercise of ordinary care should have known, that the pile of lumber was likely to fall and injure plaintiff while in the performance of his work, thereby rendering the place in which plaintiff was working dangerous and unsafe; that while plaintiff was in the exercise of due care for his own safety and ignorant of the dangerous or unsafe condition of the adjoining pile, the latter gave way, thereby causing the injuries upon which the action is based.

The evidence shows that plaintiff was an experienced lumber yard man who had worked for defendant in the same yard where he was hurt for a period of five or six years; that he had done all the various kinds of work incidental to employment in a lumber yard, including the kind of work in which he was engaged at the time of the accident, and was thoroughly familiar with the general conditions prevailing in the yard and the handling of lumber. The lumber yard in question originally belonged to the firm of Upham & Agler, who had leased it to William C. Schreiber & Company prior to the accident; ~~that~~ thereafter the lumber belonging to Upham & Agler was from time to time sold and removed from the yard and Schreiber & Company piled their lumber in the yard, as vacant space became available. At the time of the accident defendant had only three piles of lumber remaining in the yard. These piles were of hardwood lumber and ran east and west. The pile farthest north was about five feet high, eighteen feet long and several feet in width. Immediately south thereof but separated by a space of three or

while plaintiff was working for defendant in measuring the lumber, pursuant to the direction of defendant's foreman, another pile of lumber next to the pile on which plaintiff was working suddenly gave way and fell upon plaintiff by reason of the negligent manner in which it had been piled; that defendant knew, or in the exercise of ordinary care should have known, that the pile of lumber was likely to fall and injure plaintiff while in the performance of his work, thereby rendering the place in which plaintiff was working dangerous and unsafe; that while plaintiff was in the exercise of due care for his own safety and ignorant of the dangerous or unsafe condition of the adjoining pile, the latter gave way, thereby causing the injuries upon which the action is based.

The evidence shows that plaintiff was an experienced lumber yard man who had worked for defendant in the same yard where he was next for a period of five or six years; that he had done all the various kinds of work incidental to employment in a lumber yard, including the kind of work in which he was engaged at the time of the accident, and was thoroughly familiar with the general conditions prevailing in the yard and the handling of lumber. The lumber yard in question originally belonged to the firm of Upham & Ayler, who had leased it to William C. Sutherlen & Company prior to the accident; xxxxx thereafter the lumber belonging to Upham & Ayler was from time to time sold and removed from the yard and Sutherlen & Company piled their lumber in the yard, as vacant space became available. At the time of the accident defendant had only three piles of lumber remaining in the yard. These piles were of hardwood lumber and ran east and west. The pile furthest north was about five feet high, eighteen feet long and several feet in width. Immediately south thereof but separated by a space of three or

four inches, was another pile of lumber belonging to defendant, on which plaintiff was working at the time of the accident. This pile was eleven feet high and six feet wide and was made up of pieces of birch lumber six to eight feet long, two lengths being piled end to end. South of this pile was a single tier pile eighteen feet long and of about the same height, composed of lumber three inches thick by twelve inches in width. This pile belonged to William C. Schreiber & Company and is the pile that fell causing the injury to plaintiff. Defendant had nothing whatever to do with the construction of this pile. It was parallel to the pile on which plaintiff was working, but separated from it by a space of three or four inches. The third pile belonging to defendant was south of the pile that fell. All of these piles were parallel but no two were touching.

At about nine o'clock in the forenoon of the day of the accident plaintiff, with two laborers, was instructed by defendant's foreman to unpile and load upon wagons the lumber above mentioned. No other instructions were given by him and he was not present while the work was being done. Plaintiff went to the top of the pile and commenced to measure the lumber and to record the measurement upon a tally sheet. The boards were then pushed from the pile by one of the laborers upon the top of the pile to another laborer on the wagon.

As this work proceeded plaintiff was facing to the south during a portion of the time and observed the pile located to the south of him. The pile of lumber on which plaintiff was working was properly piled with cross pieces, but the pile that fell had no cross pieces. After the work had proceeded for nearly three hours, the pile of birch

four inches, was another pile of lumber belonging to defendant, on which plaintiff was working at the time of the accident. This pile was eleven feet high and six feet wide and was made up of pieces of birch lumber six to eight feet long, two lengths being piled end to end. South of this pile was a single tier pile eighteen feet long and of about the same height, composed of lumber three inches thick by twelve inches in width. This pile belonged to William C. Schneider & Company and is the pile that fell causing the injury to plaintiff. Defendant had nothing whatever to do with the construction of this pile. It was parallel to the pile on which plaintiff was working, but separated from it by a space of three or four inches. The third pile belonging to defendant was south of the pile that fell. All of these piles were parallel but no two were touching.

At about nine o'clock in the forenoon of the day of the accident plaintiff, with two laborers, was instructed by defendant's foreman to unpile and load upon wagons the lumber above mentioned. No other instructions were given by him and he was not present while the work was being done. Plaintiff went to the top of the pile and commenced to measure the lumber and to record the measurement upon a tally sheet. The boards were then passed from the pile by one of the laborers upon the top of the pile to another laborer on the wagon.

As this work proceeded plaintiff was facing to the south during a portion of the time and observed the pile located to the south of him. The pile of lumber on which plaintiff was working was properly piled with cross pieces, but the pile that fell had no cross pieces. After the work had proceeded for nearly three hours, the pile of birch

timber was so far removed that the remainder of the pile was less than two feet high. At this time half of the single tier pile to the south belonging to William C. Schreiber & Company suddenly fell toward the north, striking plaintiff on his shoulders and knocking him against the five foot pile of lumber to the north of the pile on which he was working, partly covering him and causing the injuries for which suit was brought. At the close of plaintiff's evidence and at the close of all the evidence in the case, written motions were made on behalf of defendant to instruct the jury to find for defendant, which were denied. A verdict was returned in favor of plaintiff for $5,000 and judgment entered thereon.

As grounds for reversal defendant contends that notwithstanding the pile of lumber that fell may have been unsafe, defendant and his foreman had no better opportunity to know its condition than the plaintiff, who worked only three or four feet from the face of the pile for approximately three hours and had every opportunity to observe its condition, and that plaintiff assumed the risk of his employment and is therefore precluded from a recovery.

In the case of McCormick Machine Co. v. Zakzewski, 220 Ill. 522, the facts were almost identical with those involved in the present case. In that case the plaintiff was working in a lumber yard assisted by two fellow workmen in removing stacks of lumber separated from each other by a space of less than three inches. These piles, like those involved in the case at bar, did not touch each other and one did not act as a support for the other. The plaintiff in the Zakzewski case was an experienced lumber yard employee and was injured by the falling of one of the neighbering stacks of lumber. We regard the decision of the Supreme Court in that case as conclusive in the present case.

timber was so far removed that the remainder of the pile was less than two feet high. At this time half of the single tier pile to the south belonging to William C. Schreiber & Company suddenly fell toward the north, striking plaintiff on his shoulders and knocking him against the five foot pile of lumber to the north of the pile on which he was working, partly covering him and causing the injuries for which suit was brought. At the close of plaintiff's evidence and at the close of all the evidence in the case, written motions were made on behalf of defendant to instruct the jury to find for defendant, which were denied. A verdict was returned in favor of plaintiff for $8,000 and judgment entered thereon.

As grounds for reversal defendant contends that notwithstanding the pile of lumber that fell may have been unsafe, defendant and his foreman had no better opportunity to know its condition than the plaintiff, who worked only three or four feet from the face of the pile for approximately three hours and had every opportunity to observe its condition, and that plaintiff assumed the risk of his employment and is therefore precluded from a recovery.

In the case of Kodzimbuk Machine Co. v. Zakrzewski, 220 Ill. 522, the facts were almost identical with those involved in the present case. In that case the plaintiff was working in a lumber yard assisted by two fellow workmen in removing stacks of lumber separated from each other by a space of less than three inches. These piles, like those involved in the case at bar, did not touch each other and one did not act as a support for the other. The plaintiff in the Zakrzewski case was an experienced lumber yard employee and was injured by the falling of one of the neighboring stacks of lumber. We regard the decision of the Supreme Court in that case as conclusive in the present case.

The conditions under which plaintiff was working were obvious to him or to any person of ordinary intelligence, and therefore the law charged him with knowledge of these conditions. He was old enough to comprehend the danger and was familiar with the place of his employment and the surrounding conditions. His duty to exercise ordinary prudence and care would charge him with notice of these. L. E. & W. R.R. Co. v. Wilson, 189 Ill. 89. Plaintiff was bound to prove that defendant had or ought to have had knowledge of the alleged dangerous conditions and that plaintiff did not have such knowledge and did not have equal means of obtaining it. Proof of this character is wholly lacking in the case at bar.

It is well settled that an employee voluntarily entering or continuing in an employment, knowing or having means of knowing its dangers, is deemed to have assumed the risk of his employment and to have waived all claims against his employer for damages in case of personal injuries resulting from such danger. McCormick Machine Co. v. Zakzewski, 220 Ill. 522; Cichowicz v. International Packing Co., 206 id. 346; Jenco v. Illinois Steel Co., 233 Ill. 301. The same authorities hold that such an employee assumes not only the ordinary risks incidental to his employment, but also extraordinary risks and dangers which are obvious and apparent.

It is contended by appellee that it was the duty of the employer to use ordinary care in providing a reasonably safe place to work. This is the general rule, but is not applicable to the case at bar, where the employee was engaged in doing work the nature of which was destructive to the lumber pile upon which he was employed. Weston W. & L. Co. v. O'Donnell, 101 Ill. App. 492, and cases therein cited. The evidence in the case, with all the legitimate inferences that

The conditions under which plaintiff was working were obvious to him or to any person of ordinary intelligence, and therefore the law charged him with knowledge of these conditions. He was old enough to comprehend the danger and was familiar with the place of his employment and the surrounding conditions. His duty to exercise ordinary prudence and care would charge him with notice of these. B. & O. R. R. Co. v. Wilson, 189 Ill. 99. Plaintiff was bound to prove that defendant had or ought to have had knowledge of the alleged dangerous conditions and that plaintiff did not have such knowledge and did not have equal means of obtaining it. Proof of this character is wholly lacking in the case at bar.

It is well settled that an employee voluntarily entering or continuing in an employment, knowing or having means of knowing the dangers, is deemed to have assumed the risk of his employment and to have waived all claims against his employer for damages in case of personal injuries resulting from such danger. Rockford Machine Co. v. Anderson, 220 Ill. 282; Gidbowicz v. International Machine Co., 206 id. 366; Lemon v. Illinois Steel Co., 220 Ill. 321. The same authorities hold that such an employee assumes not only the ordinary risks incidental to his employment, but also extraordinary risks and dangers which are obvious and apparent.

It is contended by appellee that it was the duty of the employer to use ordinary care in providing a reasonably safe place to work. This is the general rule, but is not applicable to the case at bar, where the employee was engaged in doing work the nature of which was destructive to the lumber pile upon which he was employed. Carson v. Ill. Cent. R. R. Co. v. O'Donnell, 101 Ill. App. 492, and cases therein cited. The evidence in the case, with all the legitimate inferences that

can be legally drawn therefrom, was insufficient to support a verdict for plaintiff. It does not show any negligence on the part of defendant and discloses such circumstances with reference to the conditions surrounding the accident that plaintiff must be considered as having assumed the risks of his employment, thereby precluding him from a recovery.

The judgment of the Superior Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

can be legally drawn therefrom, was insufficient to support a verdict for plaintiff. It does not show any negligence on the part of defendant and discloses such circumstances with reference to the conditions surrounding the accident that plaintiff must be considered as having assumed the risks of his employment, thereby precluding him from a recovery.

The judgment of the superior Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Werner, P. J., and Grigsby, J., concur.

229 - 27705

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff's employer was not guilty of the negligence charged in the declaration and that plaintiff assumed the risks of his employment.

320 - 2705

FINDING OF FACTS.

We find as ultimate facts in this case that plaintiff's employer was not guilty of the negligence charged in the declaration and that plaintiff assumed the risks of his employment.

238 - 27714

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, as administrator of the estate of HAROLD S. KNEELAND, deceased, Appellee, vs. CHICAGO AND WEST TOWNS RAILWAY COMPANY, a corporation, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

227 I.A. 608

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County upon a verdict of $8500 in an action brought by the administrator of the estate of Harold S. Kneeland, deceased, against the Chicago and West Town Railway Company, appellant, for the alleged wrongful causing of the death of said Harold S. Kneeland. The pleadings consist of a declaration of four counts and a plea of the general issue. In the course of the trial the fourth count of the declaration, which charged defendant with wilful negligence, was withdrawn. The remaining counts charged defendant with negligence in the operation and management of its car, whereby the decedent without fault on his part was fatally injured.

The evidence shows that the accident occurred at about six o'clock P. M. on December 3, 1918, at or near the corner of Stanley and Irving avenues in the City of Berwyn in this county. Stanley avenue is a street running in a general easterly and westerly direction, although its course is slightly diagonal, inclining to the northeast and the southwest. It is a half street, on the northerly portion of which defendant operated a double-track street railway, the east bound cars running on the south track and the west bound cars

CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, as administrator of the estate of HAROLD B. KNEELAND, deceased,

Appellee,

vs.

CHICAGO AND WEST TOWN RAILWAY COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE MORRIS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook county upon a verdict of $8500 in an action brought by the administrator of the estate of Harold B. Kneeland, deceased, against the Chicago and West Town Railway Company, appellant, for the alleged wrongful causing of the death of said Harold B. Kneeland. The pleadings consist of a declaration of four counts and a plea of the general issue. In the course of the trial the fourth count of the declaration, which charged defendant with willful negligence, was withdrawn. The remaining counts charged defendant with negligence in the operation and management of its car, whereby the decedent without fault on his part was fatally injured.

The evidence shows that the accident occurred at about six o'clock P. M. on December 3, 1913, at or near the corner of Stanley and Irving avenues in the city of Berwyn in this county. Stanley avenue is a street running in a general easterly and westerly direction, although its course is slightly diagonal, inclining to the northeast and the southwest. It is a half street, on the northerly portion of which defendant operated a double-track street railway, the east bound cars running on the south track and the west bound cars

on the north track. The street railroad tracks run parallel to the tracks of the Chicago, Burlington & Quincy Railroad, which occupies the southerly portion of the street. Irving avenue is a north and south street, which runs into Stanley avenue but does not cross the latter street. At a point practically opposite the northeast corner of these streets there is a cross-walk leading from the south side of the portion of Stanley avenue occupied by defendant's tracks, across the railroad tracks to the north side of another street called Windsor avenue, which is parallel to Stanley avenue and to the tracks above mentioned. This sidewalk is five feet, four inches in width. A fence on the north side of the Chicago, Burlington & Quincy Railroad Company's tracks prevents any crossing of the street by teams. The decedent was a passenger on a west bound car operated by defendant on the night of the accident. It was dark, but the scene was illuminated by an electric light at the northwest corner of the two streets.

The evidence as to the circumstances under which the accident occurred is conflicting. One of the witnesses for plaintiff, Agnes S. Webster, testified that just before the accident, she was at the rear door of the car preparatory to alighting; that the decedent stood there in conversation with the conductor; that she got off the car first and was followed immediately by another passenger, Miss Hagstrom; that Mr. Kneeland alighted from the car after Miss Hagstrom; that the car stopped a little west of the cross-walk above mentioned. Mrs. Webster testified that she got off the car first and passed around its rear end and that when she reached the middle of the east bound or south track, she suddenly heard a gong, which caused her to look up. She saw an east bound car approaching and gave a quick jump to safety on the south side of the rail,

on the north track. The street railroad tracks run parallel to the tracks of the Chicago, Burlington & Quincy Railroad, which occupies the southerly portion of the street. Irving avenue is a north and south street, which runs into Stanley avenue but does not cross the latter street. At a point practically opposite the northeast corner of these streets there is a cross-walk leading from the south side of the portion of Stanley avenue occupied by defendant's tracks, across the railroad tracks to the north side of another street called Windsor avenue, which is parallel to Stanley avenue and to the tracks above mentioned. This sidewalk is five feet, four inches in width. A fence on the north side of the Chicago, Burlington & Quincy Railroad Company's tracks prevents any crossing of the street by them. The defendant was a passenger on a west bound car operated by defendant on the night of the accident. It was dark, but the scene was illuminated by an electric light at the northwest corner of the two streets.

The evidence as to the circumstances under which the accident occurred is conflicting. One of the witnesses for plaintiff, Agnes S. Webster, testified that just before the accident, she was at the rear door of the car preparatory to alighting; that the defendant stood there in conversation with the conductor; that she got off the car first and was followed immediately by another passenger, Mine Hagstrom; that Mr. Hagstrom alighted from the car after Miss Hagstrom; that the car stopped a little west of the cross-walk above mentioned. Mrs. Webster testified that she got off the car first and passed around its rear end and that when she reached the middle of the east bound or south track, she suddenly heard a cry, which caused her to look up. She saw an west bound car approaching and gave a quick jump to safety on the south side of the rail,

and as she jumped, she looked over her shoulder and saw decedent on the north side of the north rail of the east bound track. The car passed her immediately afterwards. She did not see the car strike decedent, but after the car had passed, she saw him lying near the south rail of the west bound track.

Substantially all the other evidence in the case contradicted Mrs. Webster's testimony as to the circumstances under which the accident occurred. The other passenger, Miss Hagstrom, testified that when she alighted from the car she did not look around but proceeded in a northerly direction; that as she stepped on the sidewalk of the northeast corner of the two streets, she looked to the left over her shoulder and saw the east bound car coming about midway down the block and west of Irving Avenue. She had no difficulty seeing the car, which was lighted. After she had proceeded a distance of about fifty feet north on the east side of Irving Avenue, she heard Mrs. Webster call to her. She came back immediately and saw decedent lying upon the track.

The case was tried by plaintiff upon the theory that decedent did not hear the gong of the east bound car; that the west bound car was standing on the crossing at the time of the accident and that decedent got in front of the east bound car and was run down. Assuming that the version of the affair as given by Mrs. Webster is correct, it is apparent that decedent, after alighting from the west bound car, passed around its rear and was struck by the front of the approaching east bound car. There was no reason for assuming that the east bound car would or did stop at the point where Mrs. Webster says the accident occurred. Decedent must have seen the approaching east bound car and must have seen Mrs. Webster when she jumped from the track in order to

and as she jumped, she looked over her shoulder and saw decedent on the north side of the north rail of the east bound track. The car passed her immediately afterwards. She did not see the car strike decedent, but after the car had passed, she saw him lying near the north rail of the west bound track.

Substantially all the other evidence in the case contradicted Mrs. Webster's testimony as to the circumstances under which the accident occurred. The other passenger, Miss Hagstrom, testified that when she alighted from the car she did not look around but proceeded in a northerly direction; that as she stepped on the sidewalk of the northeast corner of the intersection, she looked to the left over her shoulder and saw the east bound car coming about midway down the block and west of Irving Avenue. She had no difficulty seeing the car, which was lighted. After she had proceeded a distance of about fifty feet north on the east side of Irving Avenue, she heard Mrs. Webster call to her. She came back immediately and saw decedent lying upon the track.

The case was tried by plaintiff upon the theory that decedent did not hear the gong of the east bound car; that the west bound car was standing on the crossing at the time of the accident and that decedent got in front of the east bound car and was run down. Assuming that the version of the affair as given by Mrs. Webster is correct, it is apparent that decedent, after alighting from the west bound car, passed around its rear and was struck by the front of the approaching east bound car. There was no reason for assuming that the east bound car would or did stop at the point where Mrs. Webster says the accident occurred. Decedent must have seen the approaching east bound car and must have seen Mrs. Webster when she jumped from the track in order to

avoid being run down. He was not in the exercise of due care if he immediately stepped in front of the east bound car under the circumstances stated. Where a person alights from a street car and passes behind such car and is struck by another going in an opposite direction, there can be no recovery if such person does not exercise care commensurate with the obvious danger of the surroundings. He must stop, look and listen. Devine v. Chicago City Ry. Co., 203 Ill. App. 411; Burke v. Same, 153 id., 388; Myhre v. Same, 216 id., 128. Under such circumstances, decedent was plainly guilty of negligence which contributed to the accident.

The conductor and motorman of the west bound car testified that they stopped at a point opposite the east side of Irving Avenue to allow passengers to alight and thereafter proceeded in a westerly direction; that they passed the east bound car near the center of the block, approximately 150 feet west of the east side of Irving Avenue. The east bound car was then lighted and traveling at the usual and customary running speed of a car between blocks. A passenger who was standing on the rear end of the west bound car, being the car on which decedent was riding corroborated this testimony as to the place where the west bound car stopped and that when the car was about sixty feet west of the west line of Irving Avenue, he noticed a man running for two or three steps and that he seemed to fall. This testimony as to the point where the cars passed each other was corroborated by the crew of the east bound car. The motorman of the east bound car testified that he saw Mrs. Webster pass in front of the car but that he saw no one else approaching the car and that no one else came in front of the car. If the circumstances existing just prior to the accident were as testified by all the other witnesses, with the exception of Mrs. Webster,

avoid being run down. He was not in the exercise of due care if he immediately stepped in front of the east bound car under the circumstances stated. Where a person alights from a street car and passes behind such car and is struck by another going in an opposite direction, there can be no recovery if such person does not exercise care commensurate with the obvious danger of the surroundings. He must stop, look and listen. Devine v. Chicago City Ry. Co., 203 Ill. App. 411; Wirtz v. Same, 153 id., 588; Wynne v. Same, 216 id., 138. Under such circumstances, decedent was plainly guilty of negligence which contributed to the accident.

The conductor and motorman of the west bound car testified that they stopped at a point opposite the east side of Irving Avenue to allow passengers to alight and thereafter proceeded in a westerly direction; that they passed the east bound car near the center of the block, approximately 150 feet west of the east side of Irving Avenue. The east bound car was then lighted and traveling at the usual and customary running speed of a car between blocks. A passenger who was standing on the rear end of the west bound car, being the car on which decedent was riding corroborated this testimony as to the place where the west bound car stopped and that when the car was about sixty feet west of the west line of Irving Avenue, he noticed a man running for two or three steps and that he seemed to fall. This testimony as to the point where the cars passed each other was corroborated by the crew of the east bound car. The motorman of the east bound car testified that he saw Webster pass in front of the car but that he saw no one else approaching the car and that no one else came in front of the car. If the circumstances existing just prior to the accident were as testified by all the other witnesses, with the exception of Mrs. Webster,

the conclusion necessarily follows that the decedent failed to see the east bound car and placed himself in such a position that he was struck by it. The bruise on decedent's head was on the left side, indicating that he was not struck by the front of the car while attempting to pass before it, as Mrs. Webster had done. No reason is shown why he could not have seen the approaching car. It was lighted, it was making the usual amount of noise, it was plainly within the scope of his vision, all of the other witnesses in the case saw it. The view was unobstructed. If decedent had properly exercised his powers of vision he must have seen it. If he looked and saw the car coming and placed himself in such a position that he was struck by the car, he was plainly guilty of negligence which contributed to the accident. Hauk v. Peoria Ry. Co., 154 Ill. App. 473; C. P. & St. L. Ry. Co. v. DeFreitas, 109 id. 104; C. R. I. & P. Ry. Co. v. Jones, 135 id. 380; Doering v. Peoria & Pekin Union Ry. Co., 196 id. 129. No negligence on the part of defendant was shown. There is no evidence in the record which standing alone was sufficient to sustain the material averments of the declaration. It is obvious that under either version advanced by the various witnesses as to the circumstances under which the accident occurred, decedent was guilty of negligence which contributed to the accident.

A considerable portion of appellant's brief is devoted to a criticism of various instructions given by the court, which we do not deem it necessary to discuss, in view of our conclusion that decedent was guilty of contributory negligence. We have carefully considered these instructions and are of the opinion that, taken as a series, they fairly state the law applicable to the case.

the conclusion necessarily follows that the accident failed to see the east bound car and placed himself in such a position that he was struck by it. The bruise on decedent's head was on the left side, indicating that he was not struck by the front of the car while attempting to pass before it, as Mrs. Webster had done. No reason is shown why he could not have seen the approaching car. It was lighted, it was making the usual amount of noise, it was plainly within the scope of his vision, all of the other witnesses in the case saw it. The view was unobstructed. If decedent had properly exercised his powers of vision he must have seen it. If he looked and saw the car coming and placed himself in such a position that he was struck by the car, he was plainly guilty of negligence which contributed to the accident. Hunt v. Pacific Ry. Co., 104 Ill. App. 473; C. B. & Q. R. R. Co. v. Pirkins, 180 Id. 104; C. & I. M. & P. Ry. Co. v. Lynes, 188 Id. 389; Worling v. Peoria & Pekin Union Ry. Co., 198 Id. 199. In negligence on the part of defendant was shown. There is no evidence in the record which standing alone was sufficient to sustain the material averments of the declaration. It is believe that under either version advanced by the various witnesses as to the circumstances under which the accident occurred, decedent was guilty of negligence which contributed to the accident.

A considerable portion of appellant's brief is devoted to a criticism of various instructions given by the court, which we do not deem it necessary to discuss. In view of our conclusion that decedent was guilty of contributory negligence. We have carefully considered these instructions and are of the opinion that, taken as a series, they fairly state the law applicable to the case.

The judgment of the Superior Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

The judgment of the Superior Court is reversed with a finding of facts.

REVERSED WITH FINDING OF FACTS.

Barnes, P. J., and Gridley, J., concur.

238 - 27714

FINDING OF FACTS.

We find as ultimate facts in this case that defendant was not guilty of negligence and that plaintiff's intestate was guilty of negligence which contributed to the accident resulting in his death.

FINDING OF FACTS.

We find as ultimate facts in this case that defendant was not guilty of negligence and that plaintiff's intestate was guilty of negligence which contributed to the accident resulting in his death.

253 - 27729

MARY GRIFFIN,
Appellee,

vs.

THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 609

MR. JUSTICE MORRILL DELIVERED THE OPINION OF THE COURT.

The appellee, Mary Griffin, sued the appellant, the National Council of the Knights and Ladies of Security, in the Municipal Court of Chicago, and in her statement of claim set out the execution of a benefit certificate to Catherine V. Griffin on March 12, 1918, for the sum of $1,000, payable to appellee, alleged the death of the insured September 25, 1920, and that notice and proof of death were furnished in compliance with the terms of the contract. An affidavit of defense was filed by defendant, and upon a trial by jury, there was a verdict for $953. Judgment for that sum and costs was entered, and this appeal has been prosecuted therefrom.

The affidavit of defense alleged that the contract between Catherine V. Griffin and the Society consisted of the benefit certificate, the application and the constitution and laws of the Society all construed together; that the insured in her application falsely stated that her father had died of pneumonia, whereas he had died of consumption; that her brother had died of pleurisy, whereas he also had died of consumption; that she falsely stated in her application that neither of her parents nor her brother had been afflicted with consumption, whereas both her father and brother had been afflicted with that disease; that she falsely stated in her

MARY GRIFFIN,
Appellee,

vs.

THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MORAHAN DELIVERED THE OPINION OF THE COURT.

The appellee, Mary Griffin, sued the appellant, the National Council of the Knights and Ladies of Security, in the Municipal Court of Chicago, and in her statement of claim set out the execution of a benefit certificate to Catherine V. Griffin on March 12, 1915, for the sum of $1,000, payable to appellee, alleged the death of the insured September 28, 1920, and that notice and proof of death were furnished in compliance with the terms of the contract. An affidavit of defense was filed by defendant, and upon a trial by jury, there was a verdict for $250. Judgment for that sum and costs was entered, and this appeal has been prosecuted therefrom.

The affidavit of defense alleged that the contract between Catherine V. Griffin and the society consisted of the benefit certificate, the application and the constitution and laws of the society all construed together; that the insured in her application falsely stated that her father had died of pneumonia, whereas he had died of consumption; that her brother had died of pleurisy, whereas he also had died of consumption; that she falsely stated in her application that neither of her parents nor her brother had been afflicted with consumption, whereas both her father and brother had been afflicted with that disease; that she falsely stated in her

application that no member of her household had during the last year suffered from or died of consumption; but that a brother, who was a member of the household during the year preceding the application, had suffered from consumption and died of that disease and that all of said statements were warranties.

The benefit certificate in question was introduced in evidence and showed that it was issued to the members upon certain express warranties, conditions and agreements. It was therein agreed that the application executed by the member is made a part of the benefit certificate and that it is true in all respects and is held to be an express warranty and to form the basis of the liability of the insurer the same as if fully set forth in the certificate and that the application, the benefit certificate and the by-laws shall be construed together as forming parts of the contract. It was stipulated in the certificate that if the application was not true in each and every part, then the certificate should be absolutely null and void and that it was issued in consideration of the warranties and agreements made by the person named in the certificate, and said member's application and medical examination.

The application was introduced in evidence and showed that the applicant had stated that her father had died at the age of sixty and the definite cause of his death was pneumonia; also that she had one brother dead, who died at the age of sixteen years and that the definite cause of his death was pleurisy; that he died September 10, 1917. There was a further statement in the application that neither of her parents nor any brother or sister had been afflicted with consumption and that no member of her household during the last two years had died or suffered from cough, consumption or lung disease. The application further agreed that the answers and statements therein contained should

application that no member of her household had during the last year suffered from or died of consumption; but that a brother, who was a member of the household during the year preceding the application, had suffered from consumption and died of that disease and that all of said statements were warranties.

The benefit certificate in question was introduced in evidence and showed that it was issued to the members upon certain express warranties, conditions and agreements. It was therein agreed that the application executed by the member is made a part of the benefit certificate and that it is true in all respects and is held to be an express warranty and to form the basis of the liability of the insurer the same as if fully set forth in the certificate and that the application, the benefit certificate and the by-laws shall be construed together as forming parts of the contract. It was stipulated in the certificate that if the application was not true in each and every part, then the certificate should be absolutely null and void and that it was issued in consideration of the warranties and agreements made by the person named in the certificate, and said member's application and medical examination.

The application was introduced in evidence and showed that the applicant had stated that her father had died at the age of sixty and the definite cause of his death was pneumonia; also that she had one brother dead, who died at the age of sixteen years and that the definite cause of his death was pleurisy; that he died September 10, 1917. There was a further statement in the application that neither of her parents nor any brother or sister had been afflicted with consumption and that no member of her household during the last two years had died or suffered from cough, consumption or lung disease. The application further agreed that the answers and statements therein contained should

form the basis of the agreement with the insurer and constitute a warranty.

The evidence showed that appellee was the mother of the insured and that the cause of the death of the insured was pulmonary tuberculosis, which was in an advanced stage when the physician commenced his treatment of the insured in June, 1920. The evidence also showed that Thomas Griffin, the father of insured, died in Chicago December 20, 1913, of pulmonary tuberculosis and that John J. Griffin, a brother of the insured, died at Chicago September 10, 1917, from pulmonary tuberculosis. The evidence showing these facts is practically undisputed, the only attempt at a denial of them being contained in the testimony of appellee, who stated that the insured was not treated for consumption, and that neither her husband nor her son were treated for consumption.

The statements made by the applicant for insurance relating to the risk and declared by the policy or any other instrument incorporated with it to be a condition of the insurance must be regarded as warranties. The truth of such a statement is in the nature of a condition precedent and it must be literally true to create any liability. Such statements will be deemed to be material, and if shown to be false, there can be no recovery on the contract even if the statements were made innocently. Crosse v. Knights and Ladies of Honor, 254 Ill. 80; Hancock v. Knights of Security, 303 Ill. 66.

It is well settled that the application for insurance constituted a part of the contract, (Crosse v. Knights and Ladies of Honor, supra) and that the statements made in the application were warranties and material to the risk. These statements which have been mentioned as to the cause of death of the father and brother of the insured were false

form the basis of the agreement with the insurer and constitute a warranty.

The evidence showed that appellee was the mother of the insured and that the cause of the death of the insured was pulmonary tuberculosis, which was in an advanced stage when the physician commenced his treatment of the insured in June, 1920. The evidence also showed that Thomas Griffin, the father of insured, died in Chicago December 20, 1913, of pulmonary tuberculosis and that John J. Griffin, a brother of the insured, died at Chicago September 10, 1917, from pulmonary tuberculosis. The evidence showing these facts is practically undisputed, the only attempt at a denial of them being contained in the testimony of appellee, who stated that the insured was not treated for consumption, and that neither her husband nor her son were treated for consumption.

The statements made by the applicant for insurance relating to the risk and declared by the policy or any other instrument incorporated with it to be a condition of the insurance must be regarded as warranties. The truth of such a statement is in the nature of a condition precedent and it must be literally true to create any liability. Such statements will be deemed to be material, and if shown to be false, there can be no recovery on the contract even if the statements were made innocently. Grosse v. Knights and Ladies of Honor, 204 Ill. 80; Hurwick v. Knights of Security, 203 Ill. 69.

It is well settled that the application for insurance constituted a part of the contract, (Grosse v. Knights and Ladies of Honor, supra) and that the statements made in

and rendered the contract void. Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Wnright v. National Council Knights and Ladies of Security, 253 Ill. 460; Hancock v. Knights and Ladies of Security, supra. Therefore there can be no recovery upon the benefit certificate involved herein.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Barnes, P. J., and Gridley, J., concur.

and rendered the contract void. Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Knights v. National Council Knights and Ladies of Security, 283 Ill. 460; Hanock v. Knights and Ladies of Security, supra. Therefore there can be no recovery upon the benefit certificate involved herein.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

Burke, P. J., and Friedly, J., concur.

FINDING OF FACT.

The court finds as an ultimate fact in this case that the application for insurance contained false statements which were material to the risk.

FINDING OF FACT.

The court finds as an ultimate fact in this case that the application for insurance contained false statements which were material to the risk.

(27252)

192 - 27148

JACOB I. GLICKERMAN, doing business as THE INDEPENDENCE PLUMBING CO.,

Appellee,

v.

DANIEL J. SULLIVAN,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 309

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Glickerman, brought this action of the fourth class in the Municipal Court of Chicago against the defendant, Sullivan, claiming that the latter was indebted to him for certain plumbing work, covering both labor and material furnished by the plaintiff, in connection with an apartment building owned by the defendant. The bill for the work in question amounted to $179.30. The evidence was heard by the court below, a jury being waived, and the court found the issues for the plaintiff and entered judgment for the amount of the bill. By this appeal the defendant seeks to reverse that judgment.

It is not denied that the defendant is the owner of the building in question and that the work and materials furnished by the plaintiff, which form the basis of his claim, were in fact furnished. It is also uncontroverted that the plaintiff never had any negotiations about this work with the defendant nor did he ever see the defendant, or know who owned the building in question, until some time after the work had been done.

JACOB I. BILDERMAN, doing business as THE INTERNATIONAL PLUMBING CO.,

Appellee,

v.

DANIEL I. SULLIVAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, Bilderman, brought this action of the fourth class in the municipal court of Chicago against the defendant, Sullivan, claiming that the latter was indebted to him for certain plumbing work, covering both labor and material furnished by the plaintiff, in connection with an apartment building owned by the defendant. The bill for the work in question amounted to $177.50. The evidence was heard by the court below, a jury being waived, and the court found the issues for the plaintiff and entered judgment for the amount of the bill. By this appeal the defendant seeks to reverse that judgment.

It is not denied that the defendant is the owner of the building in question and that the work and materials furnished by the plaintiff, which form the basis of his claim, were in fact furnished. It is also undisputed that the plaintiff never had any negotiations about this work with the defendant nor did he ever see the defendant, or know who owned the building in question, until some time after the work had been done.

It appears from the evidence that one Hahn, was the defendant's agent in looking after this building up to October 1, 1920, and after that date the defendant's agent, having charge of this building, was one, Holm. The plaintiff testified that Hahn engaged him to do the work sued for, in October of that year. Both Hahn and Holm wereoriginally made parties defendant in this case. Hahn was served with summons but Holm was not. Neither filed his appearance in the case. Both, however, were subpoenaed as witnesses and appeared at the trial. They were called as witnesses by the plaintiff, under Section 33 of the Municipal Court Act. Hahn testified that he ceased to be the agent of the building in question on October 1, 1920, at which time he turned it over to Holm; that at the time he told Holm it was necessary to make some repairs, and he suggested that they be made before the cold weather came on, as the repairs involved the steam heating plant; that he told Holm he had known the plaintiff for some years and that the plaintiff had done work for him, and he would recommend him; that Holm said; "Go ahead and do whatever necessary repairing is to be done"; that following this, he directed the plaintiff to do the work, and that after the work was done, the plaintiff asked him to whom he should send the bill and he told him it should be sent to Mr. Holm, who was the agent. When Holm was put on the stand by the plaintiff, under section 33, he testified that at the time Hahn turned the building over to him, in October 1920, he mentioned the fact that a plumber was needed to fix some pipes, and stated further that he would send him (Holm) a plumber that had been doing work for him (Hahn) for several years, whereupon he told Hahn to bring him in and "and we will find out what is to be done and take it up with the owner." There was some evidence in the record tendingto show that during the time Hahn was

It appears from the evidence that one Hahn, was the defendant's agent in looking after this building up to October 1, 1920, and after that date the defendant's agent, having charge of this building, was one, Hoim. The plaintiff testified that Hahn engaged him to do the work used for, in October of that year. Both Hahn and Hoim correspondingly made parties defendant in this case. Hahn was served with summons but Hoim was not. Neither filed his appearance in the case. Both, however, were subpoenaed as witnesses and appeared at the trial. They were called as witnesses by the plaintiff, under section 32 of the Municipal Court Act. Hahn testified that he ceased to be the agent of the building in question on October 1, 1920, at which time he turned it over to Hoim; that at the time he told Hoim it was necessary to make some repairs, and he suggested that they be made before the cold weather came on, as the repairs involved the steam heating plant; that he told Hoim he had known the plaintiff for some years and that the plaintiff had done work for him, and he would recommend him; that Hoim said: "Go ahead and do whatever necessary repairing is to be done"; that following this, he directed the plaintiff to do the work, and that after the work was done, the plaintiff asked him to when he should send the bill and he told him it should be sent to Mr. Hoim, who was the agent. When Hoim was put on the stand by the plaintiff, under section 32, he testified that at the time Hahn turned the building over to him, in October 1920, he mentioned the fact that a plumber was needed to fix some pipes, and stated further that he would send him (Hoim) a plumber that had been doing work for him (Hahn) for several years, whereupon he told Hahn to bring him in and "and we will find out what is to be done and take it up with the owner." There was some evidence in the record tending to show that during the time Hahn was

the agent of the building, the custom was for him to take care of at least the minor repairs, and deduct the cost of such repairs from the monthly collections in the way of rents, and also deduct the janitor's salary and the agent's commissions and remit the balance to the owner, and that the same custom prevailed while Holm was the agent.

The plaintiff has not filed any brief in this court. In support of his appeal the defendant first contends that the plaintiff failed to establish his contention that Hahn had been directed by Holm to employ him to perform the work sued for, by that preponderance of evidence which the law requires. On that point Hahn's testimony was favorable to the plaintiff, and that of Holm was not. These two witnesses are the only ones who testified on that point, and the argument seems to be that in that situation it cannot be said that the proper authority in the agent has been established by the preponderance of the evidence, citing Milwaukee Corrugating Co. v. Mennahan, 217 Ill. App 647, (Memorandum opinion) which is based on Peaslee v. Glass, 61 Ill. 94. We have previously had occasion to say, and here repeat, that in our opinion it is not the law in this State, that, where two witnesses contradict each other, one testifying in the affirmative on a given proposition and one in the negative, that it necessarily follows that the proposition has not been established by a preponderance of the evidence. Even where there are two such contradicting witnesses and some corroboration of the witness maintaining the negative of the given proposition, it may properly be held that the affirmative of the proposition has been established by a preponderance of the evidence. It may be clearly apparent to the court or jury that the witnessfor the affirmative is telling the truth, whereas the witness for the defendant is not, and that such apparent cor-

the agent of the building, the custom was for him to take care of at least the minor repairs, and deduct the cost of such repairs from the monthly collections in the way of rents, and also deduct the janitor's salary and the agent's commissions and remit the balance to the owner, and that the same custom prevailed while Hoim was the agent.

The plaintiff has not filed any brief in this court. In support of his appeal the defendant first contends that the plaintiff failed to establish his contention that Hahn had been directed by Hoim to employ him to perform the work sued for, by that preponderance of evidence which the law requires. On that point Hahn's testimony was favorable to the plaintiff, and that of Hoim was not. These two witnesses are the only ones who testified on that point, and the argument seems to be that in that situation it cannot be said that the proper authority in the agent has been established by the preponderance of the evidence, citing Milwaukee Carriage Co. v. Bannahan, 217 Ill. 429, 447, (Memorandum opinion) which is based on Frankie v. Glass, 61 Ill. 94. We have previously had occasion to say, and here repeat, that in our opinion it is not the law in this State, that, where two witnesses contradict each other, one testifying in the affirmative on a given proposition and one in the negative, that it necessarily follows that the proposition has not been established by a preponderance of the evidence. Even where there are two such contradicting witnesses and some corroboration of the witness maintaining the negative of the given proposition, it may properly be held that the affirmative of the proposition has been established by a preponderance of the evidence. It may be clearly apparent to the court or jury that the witness for the affirmative is telling the truth, whereas the witness for the defendant is not, and that such apparent cor-

roboration as the latter may have, is equally unworthy. Numbers alone cannot determine the question. First State Bank of Plano v. Isaacs, 221 Ill. App. 658 (Memorandum opinion) and cases there cited. Sears Roebuck & Co. v. Mears, Slayton Lumber Co. App. Ct. First Dist. Case No. 27128. Opinion filed October 18, 1922. There is another reason, however, why the judgment recovered by the plaintiff cannot stand. On his own theory of the case, he was directed to do the work which is the basis of his claim, by Hahn, at a time when the latter admittedly was no longer the defendant's agent. But the plaintiff seeks to fix liability on the defendant, by reason of the fact that the employment of the plaintiff by Hahn was authorized by Holm, who was then the defendant's agent. That Holm was the agent of the owner of this building at the time in question is not denied. There is some controversy over the extent of his authority, as to whether it was limited to collections of rents or included the making of repairs. But, if we assume that his authority was broad enough to include the making of repairs, it would not follow that he could delegate that authority to another and that this delegated authority could be exercised by the latter and the principal be bound,- especially where, as in the case at bar, the one to whom the delegated authority was alleged to have been extended, was one who had formerly been the defendant's agent but whose services the defendant had recently dispensed with. Where an agent has charge of an apartment house for an owner and is given authority by him to have repairs made as they may become necessary, the owner reposes necessarily his personal confidence in the judgment and honesty of his agent. And, where that is the situation, the agent may not delegate the authority to another. Anyone assuming to act for the owner under such delegated authority, cannot bind the principal. In

poration as the latter may have, is equally unauthorized. Numbers alone cannot determine the question. First State Bank of Plano v. Inman, 221 Ill. App. 688 (Memorandum opinion) and cases there cited. Sears Roebuck & Co. v. Mears, Clayton Lumber Co., App. Ct. First Dist. Case No. 27128. Opinion filed October 18, 1928. There is another reason, however, why the judgment recovered by the plaintiff cannot stand. On his own theory of the case, he was directed to do the work which is the basis of his claim, by Hahn, at a time when the latter admittedly was no longer the defendant's agent. But the plaintiff seeks to fix liability on the defendant, by reason of the fact that the employment of the plaintiff by Hahn was authorized by John, who was then the defendant's agent. That John was the agent of the owner of this building at the time in question is not denied. There is some controversy over the extent of his authority, as to whether it was limited to collections of rents or included the making of repairs. But, if we assume that his authority was broad enough to include the making of repairs, it would not follow that he could delegate that authority to another and that this delegated authority could be exercised by the latter and the principal be bound.- especially where, as in the case at bar, the one to whom the delegated authority was claimed to have been extended, was one who had formerly been the defendant's agent but whose services the defendant had recently dispensed with. Where an agent has charge of an apartment house for an owner and is given authority by him to have repairs made as they may become necessary, the owner reposes necessarily his personal confidence in the judgment and honesty of his agent. And, where that is the situation, the agent may not delegate the authority to another. Anyone assuming to act for the owner under such delegated authority, cannot bind the principal. In

Eldridge v. Helway, 18 Ill. 445, a principal appointed an attorney in fact to act for him in recovering possession of certain property and to take any proceedings at law or in equity necessary to accomplish the desired object. The attorney in fact employed an attorney at law, to make demand for possession, and serve a written notice. The trial court excluded the evidence of the service of the notice and the making of the demand for possession, on the ground that the authority extended to the attorney in fact, by the principal, could not be delegated. In reversing the judgment the court observed, that, "in performance of a general or special agency, many acts are to be performed, of an indifferent nature, which may as well be done by one person as another, and which an agent might find it extremely inconvenient to perform personally. The maxim withholding the power of subdelegation of authority only has place when there is an object, an end to be gained -- where the interest of the principal may be neglected or injured by substitution. When, from the nature of the act to be done, there can be no difference, the principle cannot apply. Such is the case here. There is neither confidence, skill, discretion or judgment required to deliver a written notice, and make oath of it, which could prevent the employment of any one by an agent." The court held that the act there involved, fell strictly within the class of acts which could be delegated to another, by a duly authorized agent. In Crozier v. Reins, 4 Ill. App. 564, this court held that the general agent of an owner of a building, vested with judgment and discretion in the employment of an engineer for the building, could not delegate that authority to others, so as to make the acts of the latter binding upon the principal.

Wildridge v. Hathway, 18 Ill. 626, a principal appointed an attorney in fact to act for him in recovering possession of certain property and to take any proceedings at law or in equity necessary to accomplish the desired object. The attorney in fact employed an attorney at law, to make demand for possession, and serve a written notice. The trial court sustained the evidence of the service of the notice and the making of the demand for possession, on the ground that the authority extended to the attorney in fact, by the principal, could not be delegated. In reversing the judgment the court observed, that, "in performance of a general or special agency, many acts are to be performed, of an inferior nature, which may as well be done by one person as another, and which an agent might find it extremely inconvenient to perform personally. The maxim withholding the power of subdelegation of authority only has place when there is an object, aimed to be gained -- where the interest of the principal may be neglected or injured by substitution. Then, from the nature of the act to be done, there can be no difference, the principle cannot apply. Such is the case here. There is neither confidence, skill, discretion or judgment required to deliver a written notice, and make oath of it, which could prevent the employment of any one by an agent." The court held that the act there involved, fell strictly within the class of acts which could be delegated to another, by a duly authorized agent. In Crosier v. Heine, 4 Ill. App. 564, this court held that the general agent of an owner of a building, vested with judgment and discretion in the employment of an engineer for the building, could not delegate that authority to other, so as to make the acts of the latter binding upon the principal.

In our opinion the agent of a building, whose authority includes the making of necessary repairs, may not delegate that authority to another and make the principal liable for the acts of the latter. Necessarily, in making the authority of his agent broad enough to include the making of repairs, the principal is reposing confidence in the judgment and honesty of his agent, and for that reason such authority may not be delegated.

In the case at bar, therefore, even if we assume that Holm was authorized, not only to collect the rents but to make repairs whenever necessary, he could not delegate that authority to Hahn. And, even if Hahn's testimony is correct, and Holm told him, on the first of October, to go ahead and do whatever necessary repairing was to be done, the principal would not be bound by anything Hahn did in carrying out those directions. It is apparent from the record that the plaintiff knew he was dealing with the agent. When the work was done, he asked Hahn to whom the bill should be sent, and the latter told him it should be sent to Holm. One deals with an agent at his peril, and in so doing it is incumbent upon him to satisfy himself, not only of the fact that the one with whom he is dealing is the agent, but that his authority is sufficiently broad to include the matter in hand.

For the reasons stated the judgment of the Municipal Court is reversed.

REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

In our opinion the agent of a building, whose authority includes the making of necessary repairs, may not delegate that authority to another and make the principal liable for the acts of the latter. Necessarily, in making the authority of his agent broad enough to include the making of repairs, the principal is reposing confidence in the judgment and honesty of his agent, and for that reason such authority may not be delegated.

In the case at bar, therefore, even if we assume that Hohn was authorized, not only to collect the rents but to make repairs whenever necessary, he could not delegate that authority to Mann. And, even if Hohn's testimony is correct, and Hohn told him, on the first of October, to go ahead and do whatever necessary repairing was to be done, the principal would not be bound by anything Mann did in carrying out those directions. It is apparent from the record that the plaintiff knew he was dealing with the agent. When the work was done, he asked Mann to whom the bill should be sent, and the latter told him it should be sent to Hohn. One dealt with an agent at his peril, and in so doing it is incumbent upon him to satisfy himself, not only of the fact that the one with whom he is dealing is the agent, but that his authority is sufficiently broad to include the matter in hand.

For the reasons stated the judgment of the Municipal Court is reversed.

REVERSED.

TAYLOR AND CHICHERO, JJ. CONCUR.

196 - 27152

ANDERSON & LIND MANUFACTURING CO., a corporation,
Petitioner,

v.

CARPENTERS DISTRICT COUNCIL, et al.,
Defendants.

THOMAS F. CHURCH,
Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

227 I.A. 609

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the respondent Church seeks to reverse a decree of the Circuit Court of Cook County, whereby he was found guilty of contempt of court, for which he was fined $500.00 and ordered to pay certain costs incident to the taking of evidence before a Master in Chancery. The alleged contempt, which had been complained of by the petitioner Anderson & Lind Mfg. Co. consisted of certain acts upon the part of the respondent Church, which were held to be in violation of the terms of a permanent injunction decree which had previously been secured by the Anderson & Lind Mfg. Co. against Church, the Carpenters District Council, their agents and representatives, and others.

The issues involved in this proceeding are the same as the issues involved in Case No. 27151, which is based upon the same injunction decree and the same petitions to show cause. We are this day filing an opinion in the case referred to. In

AMERICAN & LIBERTY INSURANCE CO.,
a corporation,
Plaintiff,

v.

CHARLESTON DISTRICT COUNCIL, et al.,
Defendants.

THOMAS F. GAGNON,
Appellant,

v.

ATTORNEY GENERAL OF THE STATE OF
ILLINOIS, et al,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

Opinion filed Nov. 20, 1922.

MR. JUSTICE DUFFY DELIVERED the opinion of the court.

By this appeal, the respondent at Chicago seeks to reverse a decree of the Circuit Court of Cook County, upholding an a found guilty of contempt of court, for which he was fined $50.00 and ordered to pay certain costs incident to the taking of jud- ment before a Master in Chancery. The original proceeding, which had been commenced by the American Liberty Insurance Co., consisted of certain [illegible] Circuit Court, which were held to be in violation of the terms of a permanent injunction decree which had previously been rendered by the Appellee's Circuit Ct. [illegible] Charleston District Council, their agents and representatives, and others.

The issues involved in the proceeding are [illegible] as the issues involved in the [illegible] the same injunction decree and the same principle of law [illegible]. We are thus [illegible] an opinion [illegible] in

that opinion we have fully set forth the facts involved, and the law which in our opinion is applicable to these facts, and for the reasons which we have there set forth, we are of the opinion that respondent Church was properly found to be in contempt of court, and, therefore, the decree of the Circuit Court, from which he has appealed, is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

that opinion we have fully set forth the facts involved, and the law which our opinion is applicable to these facts, and for the reasons which we have stated set forth, we are of the opinion that respondent Shutow was properly found to be in contempt of court, and, therefore, the decree of the Circuit Court, from which he has appealed, is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. DISSENT.

247 - 27205

EDWARD J. PAULING,

Appellee,

v.

EAST END GARAGE, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

227 I.A. 609

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment recovered by the plaintiff in the Municipal Court of Chicago in the sum of $1200.00, which judgment followed the verdict of the jury, finding the issues for the plaintiff and assessing his damages at that amount.

It appears from the record that the plaintiff owned an automobile which he had purchased for the use of his daughter; that the automobile was kept in the defendant garage, and whenever the plaintiff's daughter wanted to use it, she would call up the garage and ask that it be brought over to her home by one of the defendant's employees, and when she was through using the car she would call up the defendant and ask them to send one of their men to take it back to the garage. It also appears that there were occasions on which an employee of the defendant drove the plaintiff's daughter to some designated place and then returned to the garage with the car. At other times she directed the defendant to deliver the car to her at places other than her home.

247 - 27202

EDWARD J. PAULING,

Appellee,

v.

MART AND GARAGE, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE FRANCIS delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment recovered by the plaintiff in the municipal court of Chicago in the sum of $150.00, which judgment followed the verdict of the jury, finding the issues for the plaintiff and assessing his damages at that amount.

It appears from the record that the plaintiff owned an automobile which he had purchased for the use of his daughter; that the automobile was kept in the defendant garage, and whenever the plaintiff's daughter wanted to use it, she would call up the garage and ask that it be brought over to her home by one of the defendant's employees, and when she was through using the car she would call up the defendant and ask them to send one of their men to take it back to the garage. It also appears that there were occasions on which an employee of the defendant drove the plaintiff's daughter to some designated place and then returned to the garage with the car. At other times the directed the defendant to deliver the car to her at places other than her home.

It further appears that on the evening of June 21, 1919, someone called up the garage and directed that the car in question be sent to 808 Tower Court, which was not the residence of the plaintiff nor that of his daughter; that one of the defendant's employees took the car to the place designated, but found no one there to receive it; that he then drove the car to the plaintiff's residence, which was about a half mile from the Tower Court address; that upon arriving at the plaintiff's home, he was advised by the plaintiff that the car had not been ordered out of the garage and the plaintiff directed the man to take it back there. The evidence further shows that the plaintiff immediately telephoned the garage and talked with one Bain, the manager, and told him about the occurrence just referred to, and stated that apparently some one must be trying to steal the car. He told Bain that he had instructed the defendant's employee to return the car to the garage and keep it there, and in this conversation, the plaintiff testified, he told Bain that under no circumstances was he to let the car go out of the garage, until he first telephoned the plaintiff's house, and that Bain assured him he would not let the car go out unless he first telephoned the plaintiff.

It appears from the testimony of Bain that a few minutes after this talk he had with the plaintiff over the telephone, some man called up the garage and again asked that this car be sent to 808 Tower Court, and that he, Bain, told the man that he could not have the car without an order from the plaintiff. It is Bain's testimony, further, that about three minutes later the telephone rang again and the person on the telephone said: "This is Mr. Pauling talking again"; that he was very sure it was the plaintiff's voice, and that he told the witness it would be all right to let the young man have the car, and that,

It further appears that on the evening of June 21, 1919, someone called up the garage and directed that the car in question be sent to 808 Tower Court, which was not the residence of the plaintiff nor that of his daughter; that one of the defendant's employees took the car to the place designated, but found no one there to receive it; that he then drove the car to the plaintiff's residence, which was about a half mile from the Tower Court address; that upon arriving at the plaintiff's home, he was advised by the plaintiff that the car had not been ordered out of the garage and the plaintiff directed the man to take it back there. The evidence further shows that the plaintiff immediately telephoned the garage and talked with one Bain, the manager, and told him about the occurrence just referred to, and stated that apparently some one must be trying to steal the car. He told Bain that he had instructed the defendant's employee to return the car to the garage and keep it there, and in this conversation, the plaintiff testified, he told Bain that under no circumstances was he to let the car go out of the garage, until he first telephoned the plaintiff's home, and that Bain assured him he would not let the car go out unless he first telephoned the plaintiff.

It appears from the testimony of Bain that a few minutes after Bain had had his talk with the plaintiff over the telephone, some man called up the garage and again asked that this car be sent to 808 Tower Court, and that he, Bain, told the man that he could not have the car without an order from the plaintiff. It is Bain's testimony, further, that about three minutes later the telephone rang again and the person on the telephone said: "This is Mr. Fowling talking again"; that he was very sure it was the plaintiff's voice, and that he told the witness it would be all right to let the young man have the car, and that,

thereupon, he sent one of the employees of the garage to the Tower Court address with the car, and it was left there with a young man who was there to receive it. The car was never seen after that and it was, presumably, stolen. The plaintiff brought this action against the defendant seeking to recover the value of the car on the ground that its loss was due to the defendant's negligence.

In support of the appeal, the defendant contends that on the occasion in question the car was delivered pursuant to a custom that had existed from the time the car had been first brought to the garage; that the arrangement made by the plaintiff's daughter was that it was to be delivered to her house or such place as she might order, from time to time, and that the defendant had been delivering the car pursuant to such orders for some weeks and it is the contention of the defendant that in delivering the car as it did, on the occasion in question, ordinary care was exercised.

In our opinion this contention is not tenable. A mere recitation of the facts, as they are above set forth, is sufficient to indicate that after what had occurred within a few moments, the defendant could not be said to have exercised ordinary care in sending the car to the place designated pursuant to the second request, without calling the plaintiff back on the telephone to make sure that the authority that purported to be coming from the plaintiff, was really coming from him. It appears from the evidence that the person who was asking to have the car sent over to the Tower Court address, told Mr. Bain that he was Mr. Pauling, Jr., but when Bain was called up by the person claiming to be Mr. Pauling, Sr., the plaintiff, Bain made no mention of this fact.

thereupon, he sent one of the employees of the garage to the Tower Court address with the car, and it was left there with a young man who was there to receive it. The car was never seen after that and it was, presumably, stolen. The plaintiff brought this action against the defendant seeking to recover the value of the car on the ground that its loss was due to the defendant's negligence.

In support of the appeal, the defendant contends that on the occasion in question the car was delivered pursuant to a custom that had existed from the time the car had been first brought to the garage; that the arrangement made by the plaintiff's daughter was that it was to be delivered to her house or such place as she might order, from time to time, and that the defendant had been delivering the car pursuant to such orders for some weeks and it is the contention of the defendant that in delivering the car as it did, on the occasion in question, ordinary care was exercised.

In our opinion this contention is not tenable. A mere recitation of the facts, as they are above set forth, is sufficient to indicate that after what had occurred within a few moments, the defendant could not be said to have exercised ordinary care in sending the car to the place designated pursuant to the second request, without calling the plaintiff back on the telephone to make sure that the authority that purported to be coming from the plaintiff, was really coming from him. It appears from the evidence that the person who was asking to have the car sent over to the Tower Court address, told Mr. Zain that he was Mr. Fanling, Jr., but when Zain was called up by the person claiming to be Mr. Fanling, Sr., the plaintiff, Zain made no mention of this fact.

It is the further contention of the defendant that a special contract had been made with Miss Pauling with reference to defendant's liability in the case of loss, by theft, among other things; that Bain told her that the garage would assume no responsibility for the car in delivering it; that he called her attention to the signs about the garage, saying that they would not be responsible in case of thefts, and that he wanted her to understand that this was the case, and that she replied that they need not worry about that as they were having the car insured. It is the defendant's position that this conversation relieved the defendant from liability for the theft of the car, under the circumstances testified to.

Assuming that the conversation referred to took place, and amounted, as the defendant contends, to an agreement that the defendant should not be liable in case of theft, it could not be held that such an agreement covered a situation such as the one disclosed by the evidence in the case at bar. By such a contract the defendant could not relieve itself from the consequences of its own negligence. Such an agreement as is relied upon, could only refer to situations involving the theft of the car from the garage under circumstances showing no negligence on the part of the defendant, or a theft of the car from the place designated for its delivery after it had been delivered by some authorized person, or circumstances similar to those. It is the further contention that the plaintiff, who was the only witness as to the value of the car, was not qualified to testify on that question. This witness testified that he bought the car a little over a month before it was stolen; he was familiar with automobiles and had owned several different cars; that he had no experience in buying and selling automobiles, except as an owner;

It is the further contention of the defendant that a special contract had been made with him having with reference to defendant's liability in the case of loss, by theft, among other things; that he told her that the garage would assume no responsibility for the car in delivering it; that he called her attention to the signs about the garage, saying that they would not be responsible in case of theft, and that he wanted her to understand that this was the case, and that she replied that they need not worry about that, as they were buying the car insured. It is the defendant's position that this conversation relieved the defendant from liability for the theft of the car, under the circumstances testified to.

Assuming that the conversation referred to took place, and assumed, as the defendant contends, to be agreement that the defendant should not be liable in case of theft, it could not be held that such an agreement covered a situation such as the one disclosed by the evidence in the case at bar. By such a contract the defendant could not relieve itself from the consequence of its own negligence. Such an agreement as is relied upon, could only refer to situations involving the theft of the car from the garage under circumstances showing no negligence on the part of the defendant, or a theft of the car from the place designated for its delivery after it had been delivered by some authorized person, or circumstances similar to these. It is the further contention that the plaintiff, who was the only witness as to the value of the car, was not qualified to testify on that question. This witness testified that he bought the car a little over a month before it was stolen; he was familiar with automobiles and had owned several different cars; that he had no experience in buying and selling automobiles, except as an owner;

that the car in question was worth around $1500.00; that it was a new car when he purchased it and had been used about six weeks when it was stolen, and that it had been run about 2000 miles. He was asked what he paid for the car, but objection to the question was sustained. In our opinion, the witness was shown to be qualified to answer the questions he did answer and, furthermore, that he should have been permitted to answer the last question referred to, to which the court sustained an objection. The price actually paid in a bona fide sale is admissible to prove the value of the property involved, and, in the absence of further testimony, is sufficient proof of such value. Johnson v. The Canfield-Swigart Co., 292 Ill. 101; Barsness v. Hotel LaSalle Co., Ill. App. Ct., First District, case No. 27123. Opinion filed October 18, 1922; Sears Roebuck & Co. v. Mears, Slayton Lumber Co. Ill. App. Ct. First District, Case No. 27128, opinion filed October 18, 1922.

It is further urged that the verdict should not be permitted to stand, inasmuch as it is not responsive, there being no evidence in the record to justify a verdict of $1200.00. This contention also cannot be sustained. If the car in question was worth $1500.00 when it was new, and it had been driven approximately 2000 miles, over a period of six weeks, the jury were entirely justified in concluding that it then had a value of $1200.00. Or if in the opinion of the witness Pauling, it was worth $1500 when stolen, the jury were equally justified in concluding that in view of the other evidence as to the extent of its use and the fact that when stolen, it was a used car, it should be considered of the value of only $1200. Complaint is made of certain remarks made by the trial judge in the course of the trial. In our opinion no reversible error is shown in that respect.

that the car in question was worth around $1800.00; that it was a new car when he purchased it and had been used about six weeks when it was stolen, and that it had been run about 3000 miles. He was asked what he paid for the car, but objection to the question was sustained. In our opinion, the witness was shown to be qualified to answer the questions he did answer and, furthermore, that he should have been permitted to answer the last question referred to, to which the court sustained an objection. The price actually paid in a bona fide sale is admissible to prove the value of the property involved, and, in the absence of further testimony, is sufficient proof of such value. Johnson v. The Sheffield-Sheffield Co., 292 Ill. 161; Peterson v. Motor Indemnity Co., 111. App. 16., First District, case No. 27125. Opinion filed October 18, 1924; Sears Roebuck & Co. v. Morris, Division Number Ten. Ill. App. 21. First District, Case No. 27128, opinion filed October 19, 1924.

It is further urged that the verdict should not be permitted to stand, inasmuch as it is not responsive, there being no evidence in the record to justify a verdict of $1800.00. This contention also cannot be sustained. If the car in question was worth $1800.00 when it was new, and it had been driven approximately 3000 miles, over a period of six weeks, the jury were entirely justified in concluding that it then had a value of $1800.00. Or if in the opinion of the witness testing, it was worth $1800 when stolen, the jury were equally justified in concluding that in view of the other evidence as to the extent of its use and the fact that when stolen, it was a used car, it should be considered of the value of only $1800. Complaint is made of certain remarks made by the trial judge in the course of the trial. In our opinion no reversible error is shown in that respect.

We find no error in the record and the judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

We find no error in the record and the judgment of the Municipal Court is, therefore, affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ., CONCUR.

27282

256 - 27214

MINNIE WOODS,
Appellee,

v.

AUGUST KNICKELS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of forcible entry and detainer by which the plaintiff sought to recover possession of an apartment occupied by the defendant in a building of which the plaintiff was the owner. The defendant perfected this appeal from a judgment entered by the court in favor of the plaintiff.

In support of the appeal the defendant contends that the record does not contain proper proof of the plaintiff's demand for possession or of a sufficient notice to vacate.

It is clear from the testimony appearing in the bill of exceptions, that the plaintiff served a notice on the defendant the last of February, 1921. He had had a lease on the apartment in question, expiring April 30, 1920, and he held over after that day, apparently without any formal renewal of the lease. While the notice was not introduced in evidence, nor is the substance of it given in the record, sufficient appears to show that it was a sixty day notice to vacate. The plaintiff states, at one point in her testimony, that the defendant did not think he could comply with her wishes to get out in sixty days, and, at another point in her testimony she said: "I gave him notice to get out." But, apart from this, it

256 - 27214

MIGNIX WOODS,

Appellee,

v.

AUGUST KNICKERS,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of forcible entry and detainer by which the plaintiff sought to recover possession of an apartment occupied by the defendant in a building of which the plaintiff was the owner. The defendant prosecuted this appeal from a judgment entered by the court in favor of the plaintiff.

In support of the appeal the defendant contends that the record does not contain proper proof of the plaintiff's demand for possession or of a sufficient notice to vacate.

It is clear from the testimony supporting in the main of exceptions, that the plaintiff served a notice on the defendant the last of February, 1921. He had a lease on the apartment in question, expiring April 30, 1921, and he held over after that day, apparently without any formal renewal of the lease. While the notice was not introduced in evidence, nor is the substance of it given in the record, sufficient appears to show that it was a sixty day notice to vacate. The plaintiff states, at one point in her testimony, that the defendant did not think he could comply with her wishes to get out in sixty days, and, at another point in her testimony she said: "I gave him notice to get out." But, apart from this, it

should further be noted that in the trial court the defendant did not question the sufficiency of the notice, either as to the substance or the time of its service. While it is true that this was an action of the fourth class in the Municipal Court of Chicago, where written pleadings and other formalities are not required, as the defendant points out, it is also true that even in such a case one may not adopt a theory, on appeal or writ of error, which is not consistent with the theory contended for in the trial court.

It clearly appears from the record that the defendant resisted the action below on the theory also contended for here, that the plaintiff had waived her right to terminate the defendant's possession, by accepting the rent for the month of April. In our opinion that theory is not tenable. The defendant was, of course, under obligation to pay the plaintiff the rent for the premises in question, notwithstanding the service of the notice in February, until April 30, 1921, assuming the notice to have been a sixty day notice, which, in our opinion, is a proper assumption to make in view of the evidence in the record to which we have referred.

It was further apparently contended by the defendant in the trial court, that the plaintiff had agreed with the defendant that he might remain in possession after April 30, 1921, notwithstanding the notice which had been served on him. But that point does not appear to be argued by the defendant here, and, in our opinion, it could not be successfully urged. The defendant testified to a conversation he says he had with the plaintiff in April, on which he based his right to continue in possession. The plaintiff denied having any such conversation with the defendant. But whether there was any such conver-

should further be noted that in the trial court the defendant did not question the sufficiency of the notice, either as to the substance or the time of its service. While it is true that this was on motion of the fourth class in the Municipal Court of Chicago, where written pleadings and other formalities are not required, as the defendant points out, it is also true that even in such a case one may not adopt a theory on appeal or writ of error, which is not consistent with the theory contended for in the trial court.

It clearly appears from the record that the defendant resisted the motion below on the theory also contended for here, that the plaintiff had waived her right to terminate the defendant's possession, by accepting the rent for the month of April. In our opinion that theory is not tenable. The defendant was, of course, under obligation to pay the plaintiff the rent for the premises in question, notwithstanding the service of the notice in February, until April 30, 1921, assuming the notice to have been a sufficiency notice, which, in our opinion, is a proper assumption to make in view of the evidence in the record to which we have referred.

It was further apparently contended by the defendant in the trial court, that the plaintiff had waived also the defendant's right to make remedy in question after April 30, 1921, notwithstanding the notice which had been served on him. But that point does not appear to be argued by the defendant here, and, in our opinion, it could not be very seriously urged. The defendant entitled to a conveyance be made to him with the plaintiff in April, so which he based his right to continue in possession. The plaintiff denied having any such conversation with the defendant. But whether there was any such conversation

sation or not, even on the defendant's theory of it, there was no binding agreement made, extending the defendant's term.

At the conclusion of the hearing the court stated that he thought he would permit the defendant to remain in possession until August 31, 1921, upon condition that he pay rent after April 30, 1921, at the rate of $50.00 a month. This resulted in some further discussion, the defendant contending that the premises were not worth that amount. Ultimately the court ended the matter by rendering the judgment, from which the defendant has appealed.

Under the statute, it was entirely within the discretion of the court to permit the defendant to remain in possession for a certain period, and the record is not such as to lead us to conclude that there was any abuse of discretion on the part of the trial court in not affording the defendant such relief under the statute, even though he was at first disposed to do so.

For the foregoing reasons the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

sation or not, even on the defendant's theory of it, there was no binding agreement made, extending the defendant's term.

At the conclusion of the hearing the court stated that he thought he would permit the defendant to remain in confinement until August 31, 1921, upon condition that he pay rent after April 30, 1921, at the rate of $[illegible] monthly. This resulted in some further discussion, the defendant contending that the premises were not worth that amount. Ultimately the court ended the matter by remanding the judgment, from which the defendant has appealed.

Under the facts, it was entirely within the discretion of the court to permit the defendant to remain in possession for a certain period, and we cannot be justified in refusing to say to consider that there was any abuse of discretion on the part of the trial court in not extending the defendant such relief under the statute, even though he was at first disposed to do so.

For the foregoing reasons the judgment of the municipal court is affirmed.

MAYER, ACTING P.J., concurs.

2724a

293 - 27241

LOUIS MEDER AND ROSE MEDER,
Appellees,

v.

ERNST A. LARSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 610

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class brought by the plaintiffs in the Municipal Court of Chicago, by which they sought to recover from the defendant $250.00, which had been deposited by them as earnest money in connection with a contract, entered into between the parties, involving the purchase by the plaintiffs of a two flat building from the defendant. The evidence was heard by the court without a jury and a judgment was entered in favor of the plaintiffs, for the amount claimed, to reverse which the defendant has perfected this appeal.

In the statement of claim the plaintiffs allege that they had contracted to buy a two flat building from the defendant for $11,000.00, "same to be ready for occupancy May 1, 1921"; that a deposit of $250.00 had been made under this contract; that the defendant failed to complete the premises, so as to have the second apartment ready for occupancy, within the time specified in the contract. The defendant filed an affidavit of merits, in which he set up as a defense, "that the defendant was willing, able, and ready to perform said contract, but that

323 - 27241

LOUIS MEYER AND MORE MEYER, Appellees,	
v.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
ERNST A. LARSON, Appellant.	

Opinion filed Nov. 29, 1922.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was an action of the fourth class brought by the plaintiffs in the Municipal Court of Chicago, by which they sought to recover from the defendant $250.00, which had been deposited by them as earnest money in connection with a contract, entered into between the parties, involving the purchase by the plaintiffs of a two flat building from the defendant. The evidence was heard by the court without a jury and a judgment was entered in favor of the plaintiffs, for the amount claimed, to reverse which the defendants has perfected this appeal.

In the statement of claim the plaintiffs allege that they had contracted to buy a two flat building from the defendant for $11,000.00, "same to be ready for occupancy May 1, 1921"; that a deposit of $250.00 has been made under this contract; that the defendant failed to complete the premises, so as to have the second apartment ready for occupancy, within the time specified in the contract. The defendant filed an affidavit of merits, in which he set up as a defense, "that the defendant was willing, able, and ready to perform said contract, but that

the plaintiffs refused to complete purchase of said building, and did not keep appointments to close said contract." It will be noted that in his affidavit of merits the defendant made no denial of the facts alleged by the plaintiffs in their statement of claim, to the effect that the contract in question had been executed; that the earnest money had been deposited; that under the provisions of the contract the defendant was to have the premises ready for occupancy May 1, 1921; and that he failed to perform that provision of the contract. These facts are established by the allegations in the statement of claim and the failure of the defendant to deny them in his affidavit of merits.

Beyond this, the evidence introduced in behalf of the plaintiffs was such as to sustain these allegations. It is the position of the plaintiffs that the building in question was not completed when they examined it on the afternoon of April 30, 1921, and that the defendant's failure in this regard was a substantial one, whereupon, they announced they would not go ahead with the transaction and demanded the return of the amount they had deposited as earnest money. It was the contention of the defendant, and he introduced some evidence tending to show that whereas the building was not fully completed, it was practically so, and that the various things remaining to be done, could have been finished within another day's time. If the decision on this appeal rested solely on the question of whether the finding and judgment of the trial court were against the manifest weight of the evidence, we would be obliged to hold that the evidence in the record is not such as to warrant us in reaching that conclusion.

The judgment of the Municipal Court is affirmed.

TAYLOR & O'CONNOR, JJ. CONCUR. AFFIRMED.

the plaintiff refused to complete purchase of said building, and did not keep appointment to close said contract." It will be noted that in his affidavit of merits the defendant made no denial of the facts alleged by the plaintiff in their statement of claim, to the effect that the contract in question had been executed; that the earnest money had been deposited that under the provisions of the contract the defendant was to have the premises ready for occupancy by [illegible], 1921; and that he failed to perform that provision of the contract. These facts are established by the allegations on the statement of claim and the failure of the defendant to deny them in his affidavit of merits.

Beyond this, the affidavit interposed in behalf of the plaintiff was such as to sustain these allegations. It is the position of the plaintiff that the building in question was not completed when they executed the contract on April 6, 1921, and that the defendant's [illegible] in this respect was a substantial one, whereupon, they contended they would not be chased with the transaction and demanded the return of the earnest they had deposited on account thereof. [illegible] of the defendant, and on [illegible] that whether the building was actually complete, it was certainly so, and that the [illegible] human [illegible] to be [illegible] have been finished within [illegible] time. [illegible] on this appeal [illegible] on the question of whether the finding and judgment of the [illegible] weight of the evidence, we [illegible] to hold [illegible] evidence in the record [illegible] that conclusion.

The judgment of the [illegible] court is affirmed.

273000

128 - 27079

GEORGE SUTTER, et al.,
Appellees,

v.

CARL CHRISTIANSEN, et al., On appeal of CARL CHRISTIANSEN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

227 I.A. 610

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against Carl Christiansen and Samuel Laietzky to recover damages claimed to have been sustained by them by reason of a wall of defendants' building falling over on and damaging plaintiffs' personal property. Plaintiffs dismissed as to Laietzky and there was a verdict and judgment against Christiansen for $2,000.00, to reverse which this appeal is prosecuted.

The record disclosed that Christiansen owned a three-story building about 48 feet wide, 103 feet in depth and 35 feet high in which he conducted his business; that immediately adjoining this building on the east was a one-story building having a frontage of about 25 feet and a depth of about 16 feet; that back of this on the same lot was a shed and open space extending to the alley, the lot being about 108 feet deep; that this lot and building were owned by defendant Laietzky; that he had rented these premises to plaintiffs who were in the coal and feed business at that place; that between four and five o'clock on the morning of November 24, 1919, a fire started in Christiansen's building and totally destroyed it except that part of the east and west walls remained stand-

No. 27079

GEORGE SUTTER, et al., Appellees, v. CARL CHRISTIANSEN, et al., as executors of Carl Christiansen, Appellant.	APPEAL FROM WAUKEGAN COURT, LAKE COUNTY.

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against Carl Christiansen and Samuel Lakatky to recover damages claimed to have been sustained by them by reason of a wall of defendants' building falling over on and damaging plaintiffs' personal property. Plaintiffs dismissed as to Lakatky and there was a verdict and judgment against Christiansen for $1,000.00, to reverse which this appeal is prosecuted.

The record disclosed that Christiansen owned a three-story building about [illegible] feet wide, [illegible] feet in depth and 38 feet high in which he conducted his business; [illegible] immediately adjoining this building on the east was a one-story building being a frontage of about 25 feet and a depth of about 10 feet; that back of this on the same lot was a [illegible] and open space extending to the alley, the lot being about 100 feet deep; that this lot and building were owned by defendant Lakatky; that he had rented [illegible] for a [illegible] who were in the [illegible] and had stored [illegible] in the [illegible] taken from the fire [illegible] on the morning of November 26, 1921, a fire started in Christiansen's building in "totally destroyed it except that part of the east and west walls remaining standing.

ing, and some of the joists in the front and rear of the building remained in place. A portion of the east wall at about the center had also fallen as a result of the fire. Most of the destruction was caused during the first three hours of the fire although it burned for a day or so afterwards during which time the fire department continued to throw water on it. After it was finally extinguished Christiansen made ready to rebuild his building. Plaintiffs, in the conduct of their business, used a motor truck, which, when not in use, was kept in the yard in the rear of their building. On Saturday, November 29, about 7:15 o'clock in the evening, there being a strong west wind, a part of the east wall remaining after the fire fell onto plaintiffs' property including the truck and other personal property. It was for this damage that this suit was brought.

The defendant, Christiansen, contends that the trial court should have directed a verdict in his favor on the ground that the evidence showed that plaintiffs were guilty of contributory negligence in failing to remove the truck and the other personal property that was damaged by the falling wall, and for the further reason that the evidence discloses that the wall between the two buildings was a party wall and there was a common duty on the plaintiffs and defendant to protect it and keep it in repair; that the plaintiffs under their written lease from Laietzky were bound to repair this wall, and since no attempt was made to do this after the fire, and since it was as much plaintiffs' duty as it was that of the defendant to do so, a verdict should have been directed.

Both of the plaintiffs, George and Peter Butter, testified that during the fire some of the bricks from the

ing, and some of the joists in the front and rear of the building remained in place. A portion of the east wall at about the center had also fallen as a result of the fire. Most of the destruction was caused during the first three hours of the fire although it burned for a day or so afterwards during which time the fire department continued to throw water on it. After it was finally extinguished Christiansen made ready to rebuild his building. Plaintiffs, in the conduct of their business, used a motor truck, which, when not in use, was kept in the yard in the rear of their building. On Saturday, November 28, about 7:15 o'clock in the evening, there being a strong west wind, a part of the east wall remaining after the fire fell onto plaintiffs' property including the truck and other personal property. It was for this damage that this suit was brought.

The defendant, Christiansen, contends that the trial court should have directed a verdict in his favor on the ground that the evidence showed that plaintiffs were guilty of contributory negligence in failing to remove the truck and the other personal property that was damaged by the falling wall, and for the further reason that the evidence disclosed that the wall between the two buildings was a party wall and there was a common duty on the plaintiffs and defendant to protect it and keep it in repair; that the plaintiffs under their written lease from Jaletzky were bound to repair this wall, and since no attempt was made to do this after the fire, and since it was so much plaintiffs' duty as it was that of the defendant to do so, a verdict should have been directed.

Both of the plaintiffs, George and Peter Butler, testified that during the fire some of the bricks from the

top of the east wall fell and broke the roof of plaintiffs' building; that they informed Laietzky of this and he repaired it on Saturday, November 29; that immediately after the fire the east wall was leaning in the middle and was warped and cracked. The evidence further showed that plaintiffs saw Christiansen around the building every day after the fire.

Witnesses on behalf of defendant testified that the wall was not leaning or cracked but appeared to be in good condition, and that Christiansen intended to rebuild and make use of that part of the wall that remained standing after the fire. If the testimony in the record as to the condition of the wall was only that given by the two plaintiffs, it might well be argued that they were guilty of contributory negligence in leaving their trucks and other property on the rear of their lot as they did. But the evidence on behalf of defendant is to the effect that the part of the east wall standing was in good condition, and there is no evidence in the record that anything was said between the parties, or anyone else, that it was dangerous to leave the wall standing. And the evidence further shows, by the conduct of the plaintiffs in conducting their business as usual, that they did not consider that the wall was about to fall. This is also further borne out by the fact that plaintiffs' landlord repaired the roof of the building on Saturday morning but a few hours before the wall fell.

The jury were instructed that the plaintiff could not recover unless they found from the evidence that plaintiffs exercised due care to protect their property, and since they found their verdict in favor of plaintiffs, we must assume that they found plaintiffs had exercised such care, and since we cannot say that all reasonable minds would reach the conclusion

top of the east wall fell and broke the roof of plaintiffs' building; that they informed laintiffs of this and be repaired it on Saturday, November 22; that immediately after the fire, the east wall was leaning in the middle and was warped and cracked. The evidence further showed that plaintiffs was Christiansen around the building every day after the fire.

Witnesses on behalf of defendant testified that the wall was not leaning or cracked but appeared to be in good condition, and that Christiansen intended to rebuild and make use of that part of the wall that remained standing after the fire. If the testimony in the record as to the condition of the wall was only that given by the the plaintiffs, it might well be argued that they were guilty of contributory negligence in leaving their trucks and other property on the roof of their lot as they did. But the evidence on behalf of defendant is to the effect that the part of the east wall standing was in good condition, and there is no evidence in the record that anything was said between the parties, or anyone else, that it was dangerous to leave the wall standing. And the evidence further shows, by the conduct of the plaintiffs in conducting their business as usual, that they did not consider that the wall was about to fall. This is also further borne out by the fact that plaintiffs' landlord repaired the roof of the building on Saturday morning but a few hours before the wall fell.

The jury were instructed that the plaintiff could not recover unless they found from the evidence that plaintiffs exercised due care to protect their property, and since they found their verdict in favor of plaintiffs, we must assume that they found plaintiffs had exercised such care, and since we cannot say that all reasonable minds would reach the conclusion

that the plaintiffs were negligent in conducting their business after the fire, we cannot disturb the verdict. Upon a consideration of all the evidence in the record we are of the opinion that this was a question for the consideration of the jury.

But the defendant contends that this was a party wall, and under plaintiffs' lease from Laietzky it was as much the duty of plaintiffs as it was the duty of defendant to repair it and, therefore, defendant was in no way liable, and that this is shown by the lease from Laietzky to plaintiffs. The difficulty of this contention is that when plaintiffs offered the lease in evidence it was excluded on motion of defendant Christiansen and only admitted as to defendant Laietzky, who had not been dismissed out of the case at that time. Other evidence that Christiansen contends shows that the wall was a party wall is the fact that when Laietzky built his building he made use of the wall. We think this is not sufficient evidence to show that it was a party wall and, therefore, that question was not in the case.

Complaint is also made that the court should have granted Christiansen's motion to strike out all the evidence pertaining to the damages to the automobile truck on the ground that the wall was known to be unsafe and, therefore, it was plaintiffs' duty to remove the truck, which could have been easily done. Since we have held that whether the wall was apparently unsafe was a question for the jury, nothing further need be said on this point.

It is also contended that the damages were excessive and it is pointed out that Laietzky testified that he sold certain of the personal property destroyed by the falling wall to plain-

that the plaintiffs were negligent in conducting their business after the fire, we cannot disturb the verdict. Upon a consideration of all the evidence in the record we are of the opinion that this was a question for the consideration of the jury.

But the defendant contends that this was a party wall, and under plaintiffs' lease from Lafayette it was as much the duty of plaintiffs as it was the duty of defendant to repair it and, therefore, defendant was in no way liable, and that this is shown by the lease immediately to plaintiffs. The difficulty of this contention is that some plaintiffs offered the lease in evidence, was excluded on motion of defendant Christiansen and only admitted as to defendant Lafayette, who has not been dismissed out of the case at that time. Other evidence that Christiansen contends shows that the wall was a party wall is the fact that when Lafayette built the building he made use of the wall. We think this is not sufficient evidence to show that it was a party wall and, therefore, that question was not in the case.

Complaint is also made that the court should have granted Christiansen's motion to strike out all the evidence pertaining to the damage to the automobile truck, the ground that the wall was open to the weather and, therefore, it was plaintiffs' duty to remove the truck, but it could have been easily done. Since we have held that whether the wall was apparently unsafe was a question for the jury, nothing further need be said on this point.

It is also contended that the damages are excessive and it is pointed out that Lafayette settled that for some certain of the personal property destroyed by the fire in the wall, in plaintiffs

tiffs and that the price at which he sold the goods was much less than the value of them as testified to by plaintiffs. At the time Laietzky gave this testimony he was still a party to the suit, and upon a consideration of all of his evidence we think the jury were warranted in giving little or no credence to what he said. We think there was sufficient evidence to justify the amount fixed by the jury in their verdict.

There being no substantial error in the record, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

title and that the price at which he sold the goods was much less than the value of them as testified to by plaintiff. At the time Lakotsky gave this testimony he was still a party to the suit, and upon a consideration of all of his evidence we think the jury were warranted in giving little or no credence to what he said. We think there was sufficient evidence to justify the amount fixed by the jury in their verdict.

There being no substantial error in the record, the judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND CRILLY, J. CONCUR.

212 - 27169

JOHN D. SCULLY,
Appellee,

v.

OLIVER I. HAWKINS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against defendant to recover damages claimed to have been sustained by him by reason of the negligent manner in which defendant, a dentist, is alleged to have extracted one of plaintiff's teeth. Plaintiff claimed $980.00. There was a trial before a judge and jury and a verdict rendered in favor of plaintiff for $980.00, the amount of his claim. The court entered a remittitur of $380.00, and entered judgment on the verdict for the balance, $600.00, to reverse which defendant prosecutes this appeal.

Plaintiff testified that on the 28 or 29 of July, 1919, defendant extracted "a lower right jaw tooth" for him, and in so doing wrenched the tooth to one side in a violent manner thereby breaking his lower right jaw bone; that he suffered intense pain and a few days afterward became infected with blood poisoning; that on August 4 following he called on a physician but the physician declined to treat him except in connection with a dentist; that plaintiff then called on defendant and defendant washed out plaintiff's mouth and painted his jaw with iodine; that afterwards he called on Dr. Collins, a

NIS - 2/1/20

JOHN E. SCOTTY,

Appellee,

v.

OLIVER I. HAYNIKE,

Appellant.

[illegible]

[illegible]

[illegible]

Opinion filed Nov. 29, 1922.

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff [illegible] suit against defendant to recover damages [illegible] been [illegible] by reason of the negligent manner in which defendant, a dentist, is alleged to have extracted one of plaintiff's teeth. Plaintiff claimed $[illegible]. There was a trial before a judge and jury [illegible] a verdict rendering in favor of plaintiff for $[illegible]. [illegible] the court entered a [illegible] of $[illegible]. [illegible] the verdict [illegible] the [illegible] verdict which defendant prosecutes [illegible].

Plaintiff testified that [illegible] 17, 1919, defendant [illegible] a lower right [illegible] and in so doing [illegible] the [illegible] manner [illegible] by [illegible] the lower [illegible] different [illegible] with [illegible] relation to a physician and the physician declined to treat the [illegible] connection with a contract; that [illegible] and [illegible] jaw with [illegible]; that otherwise [illegible] a

physician, who had advised plaintiff to see a dentist; that plaintiff thensaw Dr. John D. Newell, a dentist, on two separate occasions and that Dr. Newell took from plaintiff's mouth a piece of bone which had been "shivered off his jaw"; he further testified that prior to the extraction of the tooth by the defendant he had been a strong healthy man; that he had never had syphilis or any other venereal disease; that "his injury and loss of time was due to the negligence and carelessness of Dr. Hawkins in extracting his tooth and in breaking his jaw bone"; that as a result he suffered great pain and was put to certain specified expense in and about endeavoring to be cured; that he was laid up at the hospital about six months; that prior to this he had been earning about $25.00 to $35.00 per week. He further testified that no one was present when the tooth was extracted except himself and the defendant. Dr. Newell testified for the plaintiff that he was called in to see plaintiff on August 4, 1919, and that plaintiff was then infected; that he declined to treat plaintiff except in connection with a dentist; that he washed plaintiff's mouth with iodine and advised him to see a dentist; that he did not examine plaintiff's jaw to see if it was fractured and that he did not know if it was fractured or not; that necrosis could be of long or short duration. Dr. Collins, for plaintiff, testified that he saw plaintiff about August 7 or 8, 1919, and that the latter was suffering great pain and his face and jaws were swollen; that there was pus which he extracted from the jaw; that "the infection was necrosis of the bone caused by a fracture;" that the fracture could have been of long or short duration; that he advised plaintiff to see a dentist and to go to the County Hospital. Dr. John D. Newell, for the plaintiff, testified that he saw

physician, who had advised plaintiff to see a dentist; that plaintiff thereupon Dr. John G. Howell, a dentist, on two separate occasions and that Dr. Howell took from plaintiff's mouth a piece of bone which had been "shivered off his jaw"; he further testified that prior to the extraction of the tooth by the defendant he had been a strong healthy man; that he had never had syphilis or any other venereal disease; that "his injury and loss of time was due to the negligence and carelessness of Dr. Hawkins in extracting his tooth and in breaking his jaw bone"; that as a result he suffered great pain and was put to certain specified expense in and about endeavoring to be cured; that he was laid up at the hospital about six months; that prior to this he had been earning about $25.00 to $35.00 per week. He further testified that no one was present when the tooth was extracted except himself and the defendant. Dr. Howell testified for the plaintiff that he was called in to see plaintiff on August 4, 1919, and that plaintiff was then informed; that he dentined to treat plaintiff except in conjunction with a dentist; that he washed plaintiff's mouth with iodine and advised him to see a dentist; that he did not examine plaintiff's jaw to see if it was fractured and that he did not know if it was fractured or not; that neurosis could be of long or short duration. Dr. Collins, for plaintiff, testified that he saw plaintiff about August 7 or 8, 1919, and that the latter was suffering great pain and his face and jaws were swollen; that there was one which he extracted from the jaw; that "the infection and neurosis of the bone caused by a fracture;" that the fracture could have been of long or short duration; that he advised plaintiff to see a dentist and to go to the County Hospital. Dr. John G. Howell, for the plaintiff, testified that he was

plaintiff early in the month of August, 1919, when he examined plaintiff's jaw bone and took therefrom a piece of bone which had been "shivered off"; that the piece of bone was "old, black, and showed that it had been shivered off for a long time", and that in his opinion, the fracture was not of recent date; that plaintiff's jaw was infected and that the infection was due to plaintiff's own negligence, absolutely; that the tooth had been extracted in an ordinarily skillful and careful manner common to that usually performed in Chicago among dentists."

The defendant, in his own behalf, testified that he extracted a "lower right cuspid tooth" of the plaintiff on or about the 28th or 29th of July, 1919; that he did not wrench plaintiff's jaw bone nor jaw teeth "to one side in a rough, violent nor careless manner;" that he did not break or fracture plaintiff's jaw bone; that "he did not extract a jaw tooth, but the lower right cuspid, which is a front tooth near the corner of the mouth"; that he used due skill and care in the extraction of the tooth; that plaintiff was afflicted with pyorrhea; that on August 5 he was called by plaintiff and that he treated plaintiff's jaw and told him to call again the next day, but that he never saw plaintiff afterwards; that at the time the tooth was extracted, J. B. Densby, another dentist, was present and saw the operation.

Densby testified that he was a dentist practicing in Chicago and that he was present and saw defendant extract plaintiff's tooth; "that the extraction was made in a skillful and careful manner; that the tooth extracted was not a jaw tooth; that plaintiff's jaw bone was neither broken nor fractured

plaintiff early in the month of August, 1919, when he examined plaintiff's jaw bone and took therefrom a piece of bone which had been "splintered off"; that the piece of bone was "old, black, and showed that it had been splintered off for a long time", and that in his opinion, the fracture was not of recent date; that plaintiff's jaw was injected and that the injection was due to plaintiff's own negligence, absolutely; that the tooth had been extracted in an unskillfully skillful and careful manner because to that usually performed in Chicago among dentists."

The defendant, in his own behalf, testified that he extracted a "lower right canine tooth" of the plaintiff on or about the 28th or 29th of July, 1919; that in the act wrench plaintiff's jaw bone nor jaw tooth "is one side in a rough, violent nor careless manner;" that he did not break or fracture plaintiff's jaw bone; that "he did not extract a jaw tooth, but the lower right canine, which is a front tooth near the corner of the mouth"; that he used the skill and care in the extraction of the tooth; that plaintiff was afflicted with pyorrhea; that on August 8 he was called by plaintiff and that he treated plaintiff's jaw and told him to call again the next day, but that he never saw plaintiff afterwards; that at the time the tooth was extracted, J. H. Dooley, another dentist, was present and saw the extraction.

Dooley testified that he was a dentist practicing in Chicago and that he was present and saw defendant extract plaintiff's tooth; "that the extraction was done in a skillful and careful manner; that the tooth extracted was not a jaw tooth; that plaintiff's jaw bone was not broken nor fractured

by Dr. Hawkins;" that the plaintiff was suffering from pyorrhea, and that the extraction was done in an ordinarily skillful and careful manner "common among dentists in the City of Chicago."

This was all the evidence offered or received on the trial. The evidence is set forth in narrative form in the record, so that probably the exact words of the several witnesses are not given. It is clear from the record that plaintiff suffered a great deal of pain on account of his fractured and infected jaw bone, but there is no evidence except that of plaintiff himself that the tooth was negligently extracted by the defendant. No surgical, medical or dental witness was asked whether, in his opinion, the extraction was done in a proper or negligent manner, and we think the subject is such as would require witnesses of that character to give their expert opinion on the subject.

In the case of Bledgett v. Nevius, 189 Ill. App. 544, where damages were sought to be recovered against defendant, a dentist, for negligently extracting plaintiff's tooth, in the operation of which plaintiff's jaw was fractured, this court said: "The case of the plaintiff is predicated solely upon the fact that a fracture of the jaw and other alleged physical injuries resulted from the treatment of the plaintiff by the defendant. Proof of a bad result is of itself no evidence of negligence or lack of skill. As has been well said, 'a physician is not a warrantor of cures. If the maxim, res ipsa loquitur', were applicable to a case like this, and a failure to cure were held to be evidence, however, slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability

by Dr. Hewins; " that the plaintiff was suffering from pyorrhoea, and that the extraction was done in an ordinarily skillful and careful manner "common among dentists in the City of Chicago."

This was all the evidence offered or received on the trial. The evidence is set forth in narrative form in the record, as that probably the exact words of the several witnesses are not given. It is clear from the record that plaintiff suffered a great deal of pain on account of his fractured and infected jaw bone, but there is no evidence except that of plaintiff himself that the tooth was negligently extracted by the defendant. No surgical, medical or dental witness was asked whether, in his opinion, the extraction was done in a proper or negligent manner, and we think the subject is such as would require witnesses of that character to give their expert opinion on the subject.

In the case of Kimball v. Bowles, 188 Ill. App. 514, where damages were sought to be recovered against defendant, a dentist, for negligently extracting plaintiff's tooth, in the operation of which plaintiff's jaw was fractured, this court said: "The case of the plaintiff is predicated solely upon the fact that a fracture of the jaw and other alleged physical injuries resulted from the treatment of the plaintiff by the defendant. Proof of a bad result is of itself no evidence of negligence or lack of skill. As has been well said, 'a physician is not a guarantor of cures.' If the maxim, res ipsa loquitur, were applicable to a case like this, and a failure to cure were held to be evidence, however, slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability

for nearly all of the 'ills that flesh is heir to.' '
The burden rested upon the plaintiff to show a want of care or skill in the treatment, and that the bad result that followed the treatment was the result of such want of care or skill. No presumption that the defendant was unskillful or negligent follows from the mere fact that the jaw was fractured and that the plaintiff was otherwise injured." And in the case of Goodman v. Bigler, 133 Ill. App. 301, it was said that whether a physician was negligent was largely a question to be determined from expert witnesses. To the same effect is the holding in Moline v. Christy, 180 Ill. 334, where it was said that the fact that a good result is not obtained in the cure of a wound is of itself no proof of negligence or lack of care, but that there must be affirmative proof of such negligence or lack of care, and that the injuries resulted therefrom. It was there also held that such proof could only be established by the testimony of experts skilled in the medical or surgical professions. See also Pettigrew v. Lewis, 26 Pac. (Kas.) 458.

There being an entire absence of any evidence in the record tending to show that the defendant was guilty of negligence, the judgment in favor of the plaintiff was unwarranted and it will, therefore, be reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

for nearly all of the 'ills that flesh is heir to.'

The burden rested upon the plaintiff to show a want of care or skill in the treatment, and that the bad result that followed the treatment was the result of such want of care or skill. No presumption that the defendant was unskillful or negligent follows from the mere fact that he has been treated and that the plaintiff was otherwise injured." And in the case of Goodman v. Bailey, 105 Ill. App. 301, it was held that whether a physician was negligent was largely a question to be determined from expert testimony. To the same effect is the holding in Reline v. Thrisby, 180 Ill. 324, where it was said that the fact that a good result is not obtained in the cure of a wound is of itself no proof of negligence or lack of care, but that he must be affirmative proof of such negligence or lack of care, and that the injuries resulted therefrom. It was there also held that such proof could only be established by the testimony of experts skilled in the medical or surgical professions. See also Partridge v. Lewis, 24 Ind. (Ind.) 452.

There being no entire absence of any evidence in the record tending to show that the defendant was guilty of negligence, the judgment in favor of the plaintiff was unwarranted and it will, therefore, be reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

2732a

221 - 27178

H. H. CULMER, Appellee, v. UNITED STATES ELECTRO CHEMICAL COMPANY, a common law trust, F.W. ARMSTRONG, HOWARD ARMSTRONG, JOHN M. STINSON AND JOHN C. BURMEISTER, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 310 5

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

H. H. Culmer brought suit against the United States Electrical Chemical Company, a common law corporation, F. W. Armstrong and Howard Armstrong individually and as co-partners doing business in the State of Illinois as the United States Electrical Chemical Company, to recover $300.00 claimed to be due him as wages at the rate of $75.00 per week. The defendants entered their appearance and filed an affidavit of merits denying that they owed plaintiff any money and denying that there was an account stated between them. Afterwards plaintiff, by leave of court, filed an amended statement of claim against the same parties substantially the same as the original statement of claim. To this amended statement of claim defendants filed an affidavit of merits setting up that the correct name of the so-called common law corporation was the United Electro Chemical Company, and denying that there was due and owing from the defendants or either of them any money to the plaintiff, and denying joint liability. The case went to trial before the court without a jury and after the evidence was all

221 - 27172

H. R. GULMER,

Appellee,

v.

UNITED STATES MINERAL CHEMICAL COMPANY, a common law trust, W. W. ARMSTRONG, HOWARD ARMSTRONG, JOHN M. STIMSON AND JOHN C. BURKHISTER,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Nov. 20, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

H. R. Gulmer brought suit against the United States Mineral Chemical Company, a common law corporation, W. W. Armstrong and Howard Armstrong individually and as co-partners doing business in the State of Illinois as the United States Mineral Chemical Company, to recover $300.00 claimed to be due him as wages at the rate of $75.00 per week. The defendants entered their appearance and filed an affidavit of merits denying that they owed plaintiff any money and denying that there was an account stated between them. Afterwards plaintiff, by leave of court, filed an amended statement of claim against the same parties substantially the same as the original statement of claim. To this amended statement of claim defendants filed an affidavit of merits setting up that the correct name of the so-called common law corporation was the United States Chemical Company, and denying that there was due and owing from the defendants or either of them any money to the plaintiff, and denying joint liability. The case went to trial before the court without a jury and after the evidence was all

in the court, on motion of plaintiff, entered an order that all the papers and proceedings be amended by making John M. Stinson and John C. Burmeister additional parties defendant and correcting the name of the so-called common law corporation in accordance with defendant's affidavit of merits to the amended statement of claim. There was a finding and judgment in plaintiff's favor against all of the defendants for $150.00, to reverse which they prosecute this appeal. Plaintiff has filed no brief in this court.

Defendants' first contention is that the judgment should be reversed because while leave was given plaintiff to amend the papers and records to show that Stinson and Burmeister had been made additional parties and to show the correct name of the so-called common law corporation, the amendments in fact were not made, and, therefore, since the record shows judgment rendered against two defendants who were not mentioned in the statement of claim the judgment cannot stand. This was a fourth class case in the Municipal Court where formality in pleading to a great extent is not required, and we would not reverse the judgment on that ground were it correct in other respects.

It is further contended for the defendants that the evidence shows that they entered into a written agreement which provided that the individual defendants should only be liable as trustee and, therefore, since the judgment runs against them individually and not in their representative capacity, it is not warranted and should be reversed. If the judgment in the instant case were against only F. W. Armstrong and Howard Armstrong, we think the point made would not warrant us in disturbing the judgment because the evidence showed that plaintiff was employ-

in the court, on motion of plaintiff, entered an order that all the papers and proceedings be amended by making John M. Stinson and John C. Burmeister additional parties defendant and correcting the name of the so-called common law corporation in accordance with defendant's affidavit of merits to the amended statement of claim. There was a finding and judgment in plaintiff's favor against all of the defendants for $150.00, to reverse which they prosecute this appeal. Plaintiff has filed no brief in this court.

Defendants' first contention is that the judgment should be reversed because while leave was given plaintiff to amend the papers and records to show that Stinson and Burmeister had been made additional parties and to show the correct name of the so-called common law corporation, the amendments in fact were not made, and, therefore, since the record shows judgment rendered against two defendants who were not mentioned in the statement of claim the judgment cannot stand. This was a fourth class case in the Municipal Court where formality in pleading to a great extent is not required, and we would not reverse the judgment on that ground were it correct in other respects.

It is further contended for the defendants that the evidence shows that they entered into a written agreement which provided that the individual defendants should only be liable as trustee and, therefore, since the judgment runs against them individually and not in their representative capacity, it is not warranted and should be reversed. If the judgment in the instant case were against only M. W. Armstrong and Howard Armstrong, we think the point made would not warrant us in disturbing the judgment because the evidence showed that plaintiff was employ-

ed by and worked only in connection with these two defendants and that Stinson and Burmeister were not in any manner mentioned. The only way they were brought into the case was by written articles of agreement entered into between the defendants and which were introduced by them at the trial and which tend to show that they were only liable as trustees. In these circumstances the judgment should not have been rendered against Stinson and Burmeister, and since this is an action on contract, we cannot affirm it as to some and reverse it as to others.

The judgment of the Municipal Court will, therefore, be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

ed by and worked only in connection with these two defend-
ants and that Stinson and Burmeister were not in any manner
mentioned. The only way they were brought into the case was
by written articles of agreement entered into between the
defendants and which were introduced by them at the trial and
which tend to show that they were only liable as trustees.
In these circumstances the judgment should not have been ren-
dered against Stinson and Burmeister, and since this is an
action on contract, we cannot affirm it as to some and reverse
it as to others.

The judgment of the Municipal Court will, therefore,
be reversed and the cause remanded.

REVERSED AND REMANDED.

THOMSON, P.J, AND TAYLOR, J. CONCUR.

271 - 27229

CITY OF CHICAGO,
Appellee,

v.

JOHN B. MONALDSON,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 611

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

A complaint was filed against defendant charging that he "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2012 of the ordinance of the City of Chicago." The case was tried before the court and the defendant found guilty as charged. A fine of $100.00 was imposed.

The defendant contends that there is no evidence in the record tending to sustain the charge made against him and, therefore, the court erred in finding him guilty and refusing to discharge him. It will, therefore, be necessary for us to set forth the evidence we find in the record.

Miss Cullinan testified on behalf of the City that she worked in Pullman and going to and from her work she passed a church located at 113th Street and South Park avenue; that there was a bench alongside the church in plain view of both streets, the church being located at the corner; that nearly every day for a period of about two weeks she saw the defendant sitting on the bench reading over and sorting some

271 - 8129

CITY OF CHICAGO,
Appellee,
v.
JOHN B. KERLIKOWSKI,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

A complaint was filed against defendant charging that he "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2012 of the ordinances of the City of Chicago." The case was tried before the court and the defendant found guilty as charged. A fine of $10.00 was imposed.

The defendant contends that there is no evidence in the record tending to sustain the charge made against him and, therefore, the court erred in finding him guilty and refusing to discharge him. It will, therefore, be necessary for us to set forth the evidence we find in the record.

Miss Sullivan testified on behalf of the City that she worked in Pullman and going to and from her work she passed a church located at 111th Street and South Park Avenue; that there was a bench alongside the church in plain view of both streets, the church being located at the corner; that nearly every day for a period of about two weeks she saw the defendant sitting on the bench reading over and setting some

papers that looked like bills; that this was around the noon hour; that she saw a child about six years old, Madoline Bach, on two or three of these occasions dancing and twisting around on the sidewalk in front of the defendant; that she did not see the child sitting on defendant's lap, nor did she see the defendant touch the child in any manner.

Miss Lewandowski testified that she was an assistant principle in the Pullman public school which was located but a few blocks from the church at 113th Street and South Park avenue; that she passed this church four times a day going to and from her home to school; that she saw defendant sitting on the bench mentioned at noontime on one occasion only; that he was looking over some kind of papers and seemed to be sorting them; that on this occasion she saw the child Madoline "dancing and twisting around on the sidewalk in front of defendant;" that she did not see the child sitting on defendant's lap and that she did not see the defendant touch or do anything to the child.

Mrs. Bach, the mother of the child, testified that Madoline was six years old; that on two or three occasions the child came home with gum, but that the witness could not find out how the child got it; that the mother went out in the morning, noon and afternoon for a week or so and watched after Madoline when she left for school and when she was due to return to see who was giving her the gum, but that she was unable to ascertain who the person was; that she had never seen the defendant until the time she testified in court.

Leopold Bach, who swore to the complaint, testified that he was the father of Madoline and that he arrested the defendant June 9, 1921, took him to a corner candy store and

papers that looked like bills; that this was around the noon hour; that she saw a child about six years old, Madeline Beck, on two or three of these occasions dancing and twirling around on the sidewalk in front of the defendant; that she did not see the child sitting on defendant's lap, nor did she see the defendant touch the child in any manner.

Mrs. Swanberg testified that she was an assistant principle in the Hallman public school which was located but a few blocks from the house at 1131 Street and quite near avenue; that she passed this church four times a day going to and from her home to school; that the two defendants sitting on the bench mentioned at noontime on one occasion only; that he was looking over some kind of papers she assumed to be setting them; that on this occasion she saw the child Madeline dancing and twirling around on the sidewalk in front of defendant; that she did not see the child sitting on defendant's lap and that she did not see the defendant touch or do anything to the child.

Mrs. Beck, the mother of the child, testified that Madeline was six years old; that on two or three occasions the child came home alone, but when the children [illegible] out for the child not it; that she [illegible] in the afternoon. Both one afternoon for a [illegible] after Madeline when she left for school [illegible] who was her to turn to see who was giving her the gum, but that she was unable to ascertain who the person was; that she had never seen the defendant until the time she testified in court.

Leopold Beck, who swore to the [illegible], testified that he was the father of Madeline and that he [illegible] the defendant June 9, 1951, took him to [illegible] and

had a neighbor hold him while the witness telephoned for the police; that prior to that time his wife had informed him that someone was giving gum to Madeline, and he wanted to find out who the person was; that on two or three occasions he followed and watched after Madeline when she was due from school at noontime, but that he never saw anyone give her any gum; that on June 9, about noontime, he saw defendant near the church sitting on a bench putting some kind of papers in a bill book; that he then saw Madeline coming along from school; that she turned and walked up to where defendant was sitting; that Madeline then saw the witness and ran to him and that she had a piece of gum, and that the defendant was chewing gum; that immediately he took the defendant by the arm and told him he was under arrest and compelled him to go to the candy store; that defendant did not resist; that there was no noise or disturbance of any kind and that he had never seen the defendant prior to that date.

Madeline Bach was called as a witness on behalf of the City and the record shows that she was not sworn. The record then is as follows: "Prosecuting Attorney: What is your name little girl? Ans. I don't know. Yes, my name is Madeline. I don't know how old I am. The Court: Little girl, do you know what it means when you come into court and raise up your right hand? Ans. No." Counsel for the defendant objected to the witness testifying as she was too young and did not understand the nature of an oath. The objection was overruled. The record then shows: "Prosecuting Attorney: Is this the man (pointing at defendant) that gave you the gum? Ans. Yes. Prosecuting Attorney: Did this man hold you on his lap? Ans. Yes." This last question was objected to on the ground that it was leading but the objection was overruled. "Prosecuting

had a neighbor call him while the witness telephoned to the police; that prior to that time she had informed him that someone was trying can to machine, and he wished to find out who the person was; that on two or three occasions he followed and watched after Madeline when she was due from school at noontime, but that he never saw anyone give her any; that on June 8, about midnight, he was celebrant near the church sitting on a bench writing some kind of papers in a dull book; that he then saw Madeline coming at the front entrance. She turned and walked up to where defendant was sitting; that Madeline then saw the witness and recognized him; that she a piece of gum, and that the defendant was chewing gum; that immediately he took the celebrant by the arm and told him he was under arrest and commanded him to go in the direction; that defendant did not resist; that there was no noise or disturbance of any kind and that he had never seen the defendant prior to that date.

Madeline Bean was called as a witness on behalf of the city and the jurors among them who was not sworn. She recited then as follows: "Examination (cross): that is you mean little girl. No. I don't know. Yes, my name is Madeline. I don't know how old. [illegible] do you know what it means when you take an oath? Raise up your right hand. Yes. [illegible] objected to the witness qualifying as an expert, the objection was not sustained and the ruling of ex ore. The objection was overruled. The record then shows: "Examination (cross): Is this the man (pointing at defendant) that [illegible] Yes. Frightening strangely: [illegible] Yes." This last question was objected to on the ground that it was leading and the objection was overruled. Examination

Attorney: Did this man lift up your dress and put his hand under it? (Objection overruled) Ans. Yes." This was all the evidence, and defendant's counsel moved that defendant be discharged. The motion was overruled and thereupon defendant took the stand and testified that he was employed by the People's Gas Light & Coke Company as a special collector; that he handled collections such as where bills were paid by checks and the checks dishonored by the bank; that he was the only man doing this work in that part of the city for the gas company, and that in doing his work he necessarily passed 113th Street and South Park avenue twice a week or on an average of three times in two weeks; that he usually arrived at the church at about noon time and that after his lunch he usually sat on a bench for about fifteen minutes looking over his work and preparing his bills so as to have them in proper order; that he saw Madeline about three times: the first time she was with two other little girls and a little boy of about her age; that he took a package of gum from his pocket and divided it among the children; that on another occasion Madeline came to him while he was sitting on the bench and asked him for gum; that the third occasion was on June 9 when he was sitting on the bench getting ready to leave when the child came up and asked him for gum and he gave her a stick; that he never held the child on his lap at any time; that he did not lift up her dress nor put his hand under it; that he did not touch the child in any manner except to give her gum.

Robert R. Burr testified that he was employed by the Gas Company as assistant superintendent of the collection department; that defendant had worked for the gas company for the past fourteen years and that the witness had known him all that time; that defendant had never been arrested before and

Attorney: Did this man lift up your dress and put his hand under it? (Objection overruled) Ans. Yes." This was all the evidence, and defendant's counsel moved that defendant be discharged. The motion was overruled and thereupon defendant took the stand and testified that he was employed by the People's Gas Light & Coke Company as a special collector; that he handled collections such as where bills were paid by checks and the checks dishonored by the bank; that he was the only man doing this work in that part of the city for the gas company, and that in doing his work he necessarily passed 1131A Street and South Park avenue twice a week or on an average of three times in two weeks; that he usually arrived at the church at about noon time and that after his lunch he usually sat on a bench for about fifteen minutes looking over his work and preparing his bills so as to have them in proper order; that he saw Madeline about three times: the first time she was with two other little girls and a little boy of about her age; that he took a package of gum from his pocket and divided it among the children; that on another occasion Madeline came to him while he was sitting on the bench and asked him for gum; that the third occasion was on June 3 when he was sitting on the bench getting ready to leave when the child came up and asked him for gum and he gave her a stick; that he never held the child on his lap at any time; that he did not lift up her dress nor put his hand under it; that he did not touch the child in any manner except to give her gum.

Robert R. Burr testified that he was employed by the Gas Company as assistant superintendent of the collection department; that defendant had worked for the gas company for the past fourteen years and that the witness had known him all that time; that defendant had never been arrested before and

that the witness had never heard any complaint against him; that he was familiar with defendant's reputation for truth and veracity, as well as for morality and that it was good.

Mrs. Minnie O'Harrin testified that she had known defendant for the past six years; that he visited her husband frequently and that she knew his reputation for truth, veracity and morality and that it was good; that she had three small children of her own and several times on Saturday afternoons when she went shopping she left the children in the care of the defendant and he always took good care of them; that she had never heard any complaint made against him before. The defendant then rested and moved that he be discharged. The prosecuting attorney then advised the court that he had another witness, a police officer, who found an obscene picture in defendant's possession. The police officer was sworn and testified that he was not the officer who made the arrest; that that officer was not in court; that there was a certain picture of an obscene nature found in the possession of the defendant at the time he was brought into the station and that he understood it was a picture with a poem and an advertisement of a hardware store printed on it, but that he had never seen it. Counsel for the defendant then moved that the testimony of this witness be stricken out and the court overruled the motion. The court then inquired of the officer if he thought the picture could be found at the station and the officer stated he would endeavor to find it. The case was then continued, the court instructing the officer to look around and see if he could find the picture, the court stating that the case would be continued and "in the meantime I want this defendant examined by Dr. Hicksen"; that he wanted the report of the Doctor at the hearing to which the case was continued. Two or three weeks later the case was called and

that the witness had never heard any complaint against him; that he was familiar with defendant's reputation for truth and veracity, as well as for morality and that it was good.

Mrs. Minnie O'Martin testified that she had known defendant for the past six years; that he visited her husband frequently and that she knew his reputation for truth, veracity and morality and that it was good; that she had three small children of her own and several times on Saturday afternoons when she went shopping she left the children in the care of the defendant and he always took good care of them; that she had never heard any complaint made against him before. The defendant then rested and moved that he be discharged. The prosecuting attorney then advised the court that he had another witness, a police officer, who found an obscene picture in defendant's possession. The police officer was sworn and testified that he was not the officer who made the arrest; that that officer was not in court; that there was a certain picture of an obscene nature found in the possession of the defendant at the time he was brought into the station and that he understood it was a picture with a poem and an advertisement of a hardware store printed on it, but that he had never seen it. Counsel for the defendant then moved that the testimony of this witness be stricken out and the court overruled the motion. The court then inquired of the officer if he thought the picture could be found at the station and the officer stated he would endeavor to find it. The case was then continued, the court instructing the officer to look around and see if he could find the picture, the court stating that the case would be continued and "in the meantime I want this defendant examined by Dr. Bierce"; that he wanted the report of the Doctor at the hearing to which the case was continued. Two or three weeks later the case was called and

the court asked the prosecutor if he had Mr. Hickson's report. The prosecutor answered that he had and handed it to the court. The court examined it and stated that it was favorable to the defendant. Thereupon counsel for defendant requested that he might see the report. This request was denied by the court on the ground that the report was not in evidence. The court then inquired as to whether the police officer had been able to locate the picture but was advised by the city prosecutor that the officer was unable to find it. The court then imposed a fine of $100.00. This is all of the evidence in the record.

Counsel for the city in his brief and argument here has not said one word touching on the merits of the case. There is not a word of argument that the finding of guilty was justified by anything that appears in the record, nor do we think such an argument could be successfully made. Counsel has, however, urged a number of hypercritical objections to the record in an endeavor to prevent this court from passing on the merits. Cases should not be disposed of in this court or any other court on some mere technicality, but the court should endeavor to pass upon the merits of the controversy where it can be done without violating some established rule of law or procedure, and we have no difficulty at all in passing on the merits of the case before us. But before doing so we will consider the technical points made.

The first is that the provisions of the ordinance which defendant is charged with having violated is not in the record; that the trial court under the law takes judicial notice of such ordinance but that this court does not; that to bring an ordinance before this court it must be incorporated in the record. This is the law as announced in many decisions of this and the Supreme

the court asked the prosecutor if he has read Mr. Hickman's report. The prosecutor answered that he had and handed it to the court. The court examined it and stated that it was favorable to the defendant. Thereupon counsel for defendant requested that he might see the report. This request was denied by the court on the ground that the report was not in evidence. The court then inquired as to whether the police officer had been able to locate the witness but was advised by the city prosecutor that the officer was unable to find it. The court then dismissed the case of $100.00. This is all of the evidence in the case.

Counsel for the city in his brief and argument here has not cited one word touching on the merits of the case. There is not a word of argument for the finding of guilty was justified by supposing that witness to the accident, may do so in such an argument could be constitutionally made. Counsel has, however, urged a number of hypothetical objections to the trial in our endeavor to prevent this case from reaching to the merits. These should not be argument of in this court or any other on some more technicality, but the court must, however, pass upon the merits of the controversy where it can be done without violating some clearly-cut rule of law or procedure, and we have no difficulty at all in reaching on the merits of the case before us. But before doing so we will consider the technical points made.

The first is that the statutory [illegible] defendant is charged with being violated in [illegible] that the trial court under the law [illegible] ordinance but that this court does not; that [illegible] before this court it must be incorporated in the record. This is the law as announced in many decisions of this and the Supreme

Court, but in the absence of the ordinance from the record is of no consequence to the decision of this case. We have no occasion to pass on the construction of the ordinance. The complaint filed against defendant charged that he "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace in violation of Section 2012 of the ordinance of the City of Chicago." The contention of the defendant is that the evidence does not sustain the charge made in the complaint. If the evidence in the record did sustain such charge and it was contended that this did not constitute a violation of the ordinance, we would presume, the ordinance not being in the record, that the trial judge took judicial notice of the ordinance and, therefore, we would presume that the trial court's finding was correct that the ordinance had been violated. But in the instant case we have no occasion to consider such question and, therefore, the absence of the ordinance from the record does not effect the question at all. The question for decision is, Does the evidence sustain the charge made in the complaint? and this question might be properly decided without the ordinance being in the record.

The next point made by counsel for the City is that the certificate of the trial judge to the facts occurring on the trial is not in compliance with section 23 of the Municipal Court Act. That section provides that in case an appeal is prosecuted from the Municipal Court the judge, if requested by either of the parties shall sign and file "a correct statement to be prepared by the party requesting the signing of the same, of the facts appearing upon the trial thereof and of all questions of law." Counsel's contention, as stated by himself, is that the

Court, but in the absence of the ordinance from the record is of no consequence to the decision of this case. We have no occasion to pass on the construction of the ordinance. The complaint filed against defendant charged that he "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and disorderly conduct to a breach of the peace in violation of Section XXIX of the ordinance of the City of Chicago." The contention of the defendant is that the evidence does not sustain the charge made in the complaint. If the evidence in the record did sustain such charge and it was contended that this did not constitute a violation of the ordinance, we would presume, the ordinance not being in the record, that the trial judge took judicial notice of the ordinance and, therefore, we would presume that the trial on its finding was correct that the ordinance had been violated. But in the instant case we have no occasion to consider such question and, therefore, the absence of the ordinance from the record does not affect the question at all. The question involved is, upon the evidence sustain the charge made in the complaint and this question might be properly decided without the ordinance being in the record.

The court being made by judgment for the city on that the certificate of the trial judge to the Illinois Supreme Court trial is not in compliance with section 22 of the Illinois Civil Act. That section provides that in case an appeal is prosecuted from the decision of the judge, it shall be the duty of the parties thereto and file a certificate stating the proceeding by the party requesting the signing of the same. The Illinois supreme upon the trial thereof and of all questions of law." Counsel's contention, as stated by Martin, is that the

certificate of the trial judge is insufficient because "it does not appear that it contains all of the evidence or all of the proceedings in the trial court," and that, therefore, it does not comply with the statute. The certificate is as follows: "I, John A. Richardson, one of the Associate Judges of the Municipal Court of Chicago, do hereby certify that the above and foregoing is a correct statement of the facts appearing upon the several sessions of the trial of the above entitled cause, and the decisions of the Court upon such questions of law." We think this is a substantial compliance with the statute. The trial judge certifies that the "foregoing" is a correct statement of the facts. If it is what it purports to be - a correct statement of the facts - it means all of the facts and not a part of them. The point is hypercritical and without merit.

Counsel for the City next contends that the case is not properly before us because the appeal bond in the record while it contains the words "Approved, John A. Richardson, Judge, Seal," yet there is no order in the record approving the appeal bond, and that since the statute requires the bond to be approved, and since the most that can be said is that it was approved by the judge, the case is not properly presented here. No motion has been made to dismiss the appeal although the record has been here for some time.

On the merits of the case the record discloses that the only matter that would in any way tend to show that the defendant was guilty of the charge against him was the statement of the little girl. And we think from an examination of the record that she did not understand the nature of the oath. If she did not so understand she should not be permitted to

certificate of the trial judge is insufficient because "it does not appear that it contains all of the evidence or all of the proceedings in the trial court," and that, therefore, it does not comply with the statute. The certificate is as follows:

"I, John A. Mikmakson, one of the associate judges of the Municipal Court of Chicago, do hereby certify that the above and foregoing is a correct statement of the facts appearing upon the several occasions of the trial of the above entitled cause, and the decisions of the Court upon such questions of law." We think this is a substantial compliance with the statute. The trial judge certifies that the "foregoing" is a correct statement of the facts. If it is what it purports to be - a correct statement of the facts - it means all of the facts and not a part of them. The point is hypertechnical and without merit.

Counsel for the city next contends that the case is not properly before us because the signed and in the record while it contains the words "Approved, John A. Mikmakson, Judge. Cont." yet there is no order in the record approving the signed bond, and that when the statute requires the bond to be approved, and since the mere fact that you be said is that it was approved by the judge, the case is not properly presented here. No motion has been made to dismiss the appeal although the record has been here for some time.

In the brief of the case the record discloses that the only matter that would in any way lead to show that the defendant was guilty of the charge against him was the statement of the little girl. And we think from the examination of the record that she did not understand the nature of the oath. If she did not, we understand she should not be permitted to

testify. In fact she did not testify in this case at all as she was not sworn. We know of no way of proving matters in a court of record in this State except under oath or affirmation. There was no oath or affirmation so far as the child was concerned. Testimony given in a case in court must have the sanction of an oath. 1 Greenleaf on Evidence (16th ed.) sec. 328; 3 Wigmore on Evidence, sec. 1824; R. v. Brazier, East, Pl. Cr., 1-443 If a child is found not competent to take an oath, its testimony cannot be received. A careful consideration of all the evidence in the record, and which we have set forth rather fully, shows beyond question that there was no evidence against the defendant to sustain the charge and, therefore, he should have been discharged.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

lowship. In fact she did not testify in this case at all as she was not sworn. We know of no way of proving matters in a court of record in this state except under oath or affirmation. There was no oath or affirmation so far as the child was concerned. Testimony given in a case in court must have the sanction of an oath. 1 Greenleaf on Evidence (16th ed.) sec. 328; 3 Wigmore on Evidence, sec. 1824; R. v. Brasier, East, PC. Vx.,1-443 If a child is found not competent to take an oath, its testimony cannot be received. A careful consideration of all the evidence in the record, we which we have set forth rather fully, shows beyond question that there was no evidence against the defendant to sustain the charge and, therefore, he should have been discharged.

The judgment of the municipal court of Tulsa is reversed.

It is so ordered.

IRWIN, P.J., and BAILEY, J., concur.

27238

27342

280-27338

FREDERICK PARTIE,
Appellee,

-vs-

CHICAGO RAILWAYS COMPANY, et al,
Appellants.

Appeal from
Circuit Court,
Cook County.

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

227 I.A. 611

By this appeal defendants seek to reverse a judgment of $6000.00 recovered by plaintiff in an action for personal injuries.

Plaintiff's theory of the case was that while he was in the act of boarding one of defendants' street cars which was stopped at a regular stopping place to take on and discharge passengers, the car started before he had time to board it and he was thrown to the pavement and injured. On the other hand defendants' contention was that plaintiff did not attempt to board the car until after it had started up. Plaintiff and two other witnesses called in his behalf testified to the effect that the car had stopped at a regular stopping place to take on passengers and that some passengers got on the car; that plaintiff then placed one foot on the lower step and took hold of the handrail when the car started up and he was thrown or fell from the car and injured. On behalf of defendants seven witnesses gave evidence to the effect that after the car stopped at a regular stopping place some persons boarded it and the car then started up and other persons got on while the car was in motion; that afterwards while the car was increasing its speed around a curve, plaintiff attempted to get on and was thereby injured.

Counsel for defendants earnestly insist that the verdict of the jury is against the manifest weight of the

280-27250

FREDERICK PARTIE,

Appellee,

-vs-

CHICAGO RAILWAYS COMPANY, et al,

Appellants.

Appeal from

Circuit Court,

Cook County.

Opinion filed Nov. 29, 1922.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal defendants seek to reverse a judgment of $2000.00 recovered by plaintiff in an action for personal injuries.

Plaintiff's theory at the close was that while he was in the act of boarding one of defendants' street cars which was moving at a regular stopping place to alight on and discharge passengers, the car started before he had time to board it and he was thrown to the pavement and injured. On the other hand defendants' contention was that plaintiff did not attempt to board the car until after it had started up. Plaintiff had two other witnesses testify in his behalf testified to the effect that the car had stopped at a regular stopping place to take on passengers and that some passengers got on the car; that plaintiff then stood on the step on the lower step and took hold of the handrail with the left hand and he was thrown or is I know the car and was injured. On behalf of defendants seven witnesses gave evidence to the effect that after the car stopped at a regular stopping place some passengers boarded it and the car was started up and on the step and on while the car was in motion; that plaintiff was walking the car and was increasing his speed around the curve, and fell, sustained to get on and was thereby injured.

Counsel for defendants earnestly insist that the verdict of the jury in favor of the plaintiff violate of the

evidence and that the judgment should be reversed with a finding off fact. We have carefully considered all of the evidence in the record and have examined it in the light of the able argument made by counsel, but are of the opinion that we would not be warranted in saying that the finding of the jury, which has been approved by the trial court, is against the manifest weight of the evidence. A reading of the evidence from the printed pages of the record might lead to the conclusion contended for by defendants if we should leave out of consideration the action of the jury and the better opportunity they had for determining the truth than we have here. To set aside the verdict this court must find that it is manifestly against the weight of the evidence after taking into consideration the better opportunity of the jury and of the trial court to determine the question by reason of their opportunity to see and hear the witnesses. Marble v. Marble, 304 Ill. 239.

Since we have reached the conclusion that the judgment must be reversed for another reason we have refrained from discussing the testimony in the record.

The declaration was in two counts. The first contained allegations to the effect that the car was standing still when plaintiff attempted to board it. The second was based on the theory that the car was moving slowly when plaintiff attempted to board it. The defendants contend that it was error for the trial court to refuse to eliminate the second count because there was no evidence to support it. We are of opinion that there was no evidence to sustain the second count and the court should have eliminated it as requested, but the failure to do so is not a legal ground for reversing the judg-

evidence and that the judgment should be reversed with a finding of fact. We have carefully considered all of the evidence in the record and have examined it in the light of the able arguments made by counsel, but are of the opinion that we would not be warranted in saying that the finding of the jury, which has been approved by the trial court, is against the manifest weight of the evidence. A reading of the evidence from the printed pages of the record might lead to the conclusion contended for by defendants if we should leave out of consideration the action of the jury and the better opportunity they had for determining the truth than we have here. To set aside the verdict this court must find that it is manifestly against the weight of the evidence after taking into consideration the better opportunity of the jury and of the trial court to determine the question by reason of their opportunity to see and hear the witnesses. Wright v. Wright, 324 Ill. 528.

Since we have reached the conclusion that the judgment must be reversed for another reason we have refrained from discussing the testimony in the record.

The explanation was in two counts. The first contained allegations to the effect that the car was standing still when plaintiff attempted to board it. The second was based on the theory that the car was moving slowly when plaintiff attempted to board it. The defendants contend that it was error for the trial court to refuse to submit to the second count because there was no evidence to support it. We are of opinion that there was no evidence to support the second count and the court should have eliminated it as requested, but the failure to do so is not a legal ground for reversing the judg-

ment. Scott v. Parlin & Orendorf Co., 245 Ill. 460. But upon a re-trial of the case, if the evidence is the same as that in the record before us, we think the trial court should eliminate the second count of the declaration.

It is further contended by the defendants that the first count of the declaration was not good as a pleading; that it did not state a cause of action and that the court erred in giving an instruction on behalf of plaintiff which told the jury in substance that if plaintiff proved the allegations of the first count, he was entitled to recover. The argument in support of this seems to be based on the ground that it is not alleged in the count that any acts of the defendants were negligently done. The count does not allege specifically that the acts of defendants were negligently done, but it was not necessary to do this if the acts alleged show that the defendants were guilty of any negligence. The substance of the allegations of the count is that the defendants were common carriers operating the street car in question; that the car came to a stop for the purpose of taking on and discharging passengers, and while it was stopped for that purpose the plaintiff, with notice to the defendants and with all due care and caution for his own safety, the defendants, through their agents, did not stop the car a reasonable length of time to enable plaintiff to board it, but suddenly started the car forward and by reason of such negligence the plaintiff was thrown to the ground and injured. We think the count is not subject to the objection made. Of course, it follows that the instruction given on behalf of plaintiff was not improper.

The defendants offered three instructions phrased in different language but all to the effect that if the jury believed from the evidence that plaintiff attempted to board the car in

mont. Scott v. Parlin & Orendorf Co., 245 Ill. 490. But upon a re-trial of the case, if the evidence is the same as that in the record before us, we think the trial court should eliminate the second count of the instruction.

It is further contended by the defendants that the first count of the instruction was not good as a pleading; that it did not state a cause of action and that the court erred in giving an instruction on behalf of plaintiff which told the jury in substance that if plaintiff proved the allegations of the first count, he was entitled to recover. The argument in support of this ground to be based on the ground that it is not alleged in the count that any acts of the defendants were negligently done. The count does not allege specifically that the acts of defendants were negligently done, but it was not necessary to do this if the acts alleged show that the defendants were guilty of any negligence. The substance of the allegations of the count is that the defendants were common carriers operating the street car in question; that the car came to a stop for the purpose of taking on and discharging passengers, and while it was stopped for that purpose the plaintiff, with notice to the defendants and with all the care and caution for his own safety, the defendants, through their agents, did not stop the car a reasonable length of time to enable plaintiff to board it, but suddenly started the car forward and by reason of such negligence the plaintiff was thrown to the ground and injured. To state the count is not subject to the objection made. Of course, it follows that the instruction given on behalf of plaintiff was not improper.

The defendants offered three instructions phrased in different language but all to the effect that if the jury believed from the evidence that plaintiff attempted to board the car in

question while it was in motion and was injured as a result thereof, he could not recover. The court refused to give any of these instructions but did give another instruction offered by the defendants which told the jury that if they found from the evidence that plaintiff was injured while boarding the car while it was in motion and that such conduct on his part was a want of ordinary care for his own safety which contributed to the injury complained of, then he could not recover. The defendants contend that they were entitled to at least one of the three instructions refused. We think the court should have given one of the instructions offered because a consideration of the evidence clearly shows that the theory of the plaintiff, and his evidence, was that he started to board the car while it was standing still and that it started forward before he had time to do so. The theory of the defendants, and their evidence in support of it, was to the effect that after the car had stopped to take on passengers and after the passengers had boarded the car while it was stopped it was then started and other passengers ran after and got on the car, and after this plaintiff attempted to get on. Each side was entitled to an instruction on its theory of the case. Of course, there are circumstances where a person would not be guiltyof negligence in attempting to board a car which had stopped to take on passengers after it had started up, for example, where a person was standing in a street at the proper place to board a car and the car came to a stop but did not stop a sufficient length of time to enable the person to get on. But that is not the situation before us, because if the testimony of defendants' witnesses was true, plaintiff was not at the proper place to board the car when it stopped, but was a considerable distance from such place, and in these circumstances, of course, there would be no invitation to the plaintiff to become a passenger at

question while it was in motion and was injured as a result thereof, he could not recover. The court refused to give any of these instructions but did give another instruction offered by the defendants which told the jury that if they found from the evidence that plaintiff was injured while boarding the car while it was in motion and that his conduct on his part was a mere ordinary care for his own safety which contributed to the injury complained of, then he could not recover. The defendants contend that they were entitled to at least one of the three instructions refused. We think the court should have given one of the instructions offered because a consideration of the evidence clearly shows that the theory of the plaintiff, and his evidence, was that he started to board the car while it was standing still and that it started forward before he or the other passenger had time to do so. The theory of the defendants, and their evidence in support of it, was to the effect that either the car had not been stopped to take on passengers and after the passengers had started to board the car it was stopped and got on the way, and after this plaintiff attempted to get on. Each side was entitled to an instruction on its theory of the case. In course, there was evidence upon which a jury could be justified in returning to which a verdict which would be to give an instruction which it had refused to give, for example, where a person was attempting to board a street car and was injured while so doing, or where a person was attempting to board a car and had not been [illegible] a reasonable length of time to board the car, [illegible] the instruction before us, assumes in his evidence, the defendants' evidence was true. [illegible] board the car when it started, but [illegible] evidence from such place, and in these circumstances, [illegible] would be no invitation to the plaintiff to board a passenger car

the time and place in question. And upon a consideration of all the evidence in the record, we think it clear that the defendants were entitled to an instruction on their theory of the case, and are unable to say that they were not prejudiced by the refusal of the court to give such instruction. It follows that the judgment of the Circuit Court of Cook County must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, J. concurs.
THOMSON, P.J. dissenting:

While I concur in the view that the defendants were entitled to have some one of the three instructions offered given, and that the trial court erred in refusing them, I am not of the opinion that the verdict for the plaintiff is not against the manifest weight of the evidence. It seems to me to be clearly so, and therefore that the judgment should be reversed with a finding of fact. As the cause is to be remanded for a new trial, I shall refrain from commenting on the evidence.

the time and place in question. And upon a consideration of all the evidence in the record, we think it clear that the defendants were entitled to an instruction on their theory of the case, and are unable to say that they were not prejudiced by the refusal of the court to give such instruction. It follows that the judgment of the Criminal Court of Cook County must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

TAYLOR, J. concurs.
THOMSON, P.J. dissenting:

While I concur in the view that the defendants were entitled to have some one of the three instructions offered given, and that the refusal of so in refusing them, I am not of the opinion that the verdict for the plaintiff is not against the manifest weight of the evidence. It seems to me to be clearly so, and therefore this judgment should be reversed with a finding of fact. As the case is to be remanded for a new trial, I see nothing from consideration of the evidence.

42 - 26982

ISRAEL BERGER AND TILLIE BERGER, Plaintiffs in Error, v. BESSIE BERGER, CHARLES W. PETERS, Sheriff, and LEON FIEDELMAN, Defendants in Error,	ERROR TO SUPERIOR COURT, COOK COUNTY.
BESSIE BERGER, Defendant in Error, v. ISRAEL BERGER, TILLIE BERGER and LEON FIEDELMAN, Plaintiffs in Error,	

Opinion filed November 29,'22.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This suit involves a bill of complaint to restrain the defendant, Bessie Berger, from ousting the complainants under a judgment for possession of certain property and for an accounting and a reconveyance of certain real estate and for such other relief as may be equitable.

The defendant Bessie Berger filed a cross-bill and asked that a certain affidavit filed in the Recorder's Office be removed as a cloud upon her title to the property in question. A decree was entered finding the equities in favor of Bessie Berger, the Cross-complainant, and dismissing the original Bill of Complaint.

The property involved consists of a twelve flat building and a brick barn, located at 1037 and 1039 Racine

ISRAEL BERGER AND ZILLIE BERGER,

Plaintiffs in Error,

v.

BESSIE BERGER, CHARLES W. PETERS, Sheriff, and LEON FIEDELMAN,

Defendants in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

BESSIE BERGER,

Defendant in Error,

v.

ISRAEL BERGER, ZILLIE BERGER and LEON FIEDELMAN,

Plaintiffs in Error.

Opinion filed November 29, '22.

MR. JUSTICE MAGRUDER delivered the opinion of the court.

This suit involves a bill of complaint to restrain the defendant, Bessie Berger, from suing the complainants under a judgment for possession of certain property and for an accounting and a reconveyance of certain real estate and for such other relief as may be available.

The defendant Bessie Berger filed a cross-bill and asked that a certain affidavit filed in the Recorder's office be removed as a cloud upon her title to the property in question. A decree was entered finding the equities in favor of Bessie Berger, the cross-complainant, and dismissing the original Bill of Complaint.

The property involved consists of a twelve flat building and a brick barn, located at 1627 and 1629 Racine

avenue, Chicago.

To understand this litigation it is necessary to consider a former suit in equity in the Circuit Court in this County involving the same property, and in which a final decree was entered. That suit was brought by Bessie Berger against Israel Berger and George Young to remove certain clouds, particularly, a sheriff's deed to one Young, and establish title in her to the real estate in question. The decree entered in that case found and decreed substantially as follows:

> That on September 13, 1907, Israel Berger was the owner in fee simple of lot 16 and was in possession, and together with his wife gave a warranty deed of the premises to Emelie Eastman, which was recorded September 14, 1907.
>
> That on September 13, 1907, Israel Berger was the equitable owner and in possession of lot 15; that the legal title was in one Davis Fiedelman; that on February 1, 1906, one Henry Scheresewsky for a valuable consideration paid to him by Israel Berger conveyed by warranty deed lot 15 to Davis Fiedelman which was recorded March 5, 1907.
>
> That on September 13, 1907, Isaac (Israel) Berger procured Davis and Anna Fiedelman to execute a warranty deed to Emelie Eastman of lot 15, which was recorded September 14, 1907.
>
> That on January 11, 1912, Emelie Eastman conveyed by warranty deed the two lots, 15 and 16, to Leon Fiedelman, which deed was recorded January 12, 1912.
>
> That on November 4, 1913, Leon Fiedelman, a bachelor, conveyed lots 15 and 16 by warranty deed to Isaac Berger, the husband of Bessie Berger, which was recorded July 25, 1914.
>
> That Isaac Berger at the time of the last conveyance paid Leon Fiedelman a consideration of $1769.00, which was the money of Bessie Berger.
>
> That at the time of the conveyance by Leon Fiedelman to Isaac Berger the property was subject to an aggregate of $15,000.00 in mortgages and other liens of record; that Isaac Berger became possessed of the legal title of the premises in question.
>
> That at the time of the conveyance by Leon Fiedelman to Isaac Berger an agreement was entered into between Isaac and Bessie Berger on the one hand and Israel and Tillie Berger whereby Israel and Tillie agreed to collect the rents and profits from the premises in question and apply them to the

avenue, Chicago.

To understand this litigation it is necessary to consider a lower suit in equity in the Circuit Court in this County involving the same property, and in which a final decree was entered. That suit was brought by Bessie Berger against Israel Berger and George Young to remove certain clouds, particularly, a sheriff's deed to one Young, and establish title in her to the real estate in question. The decree entered in that case found and decreed substantially as follows:

> That on September 12, 1927, Israel Berger was the owner in fee simple of lot 16 and was in possession, and together with his wife, Tillie, was [illegible] deed of the premises to Bessie Yoiman, which was recorded September 14, 1927.
>
> That on September 13, 1927, Israel Berger was the equitable owner and in possession of lot 15; that the legal title was in one Louis Fiedelman; that on February 1, 1926, one Mary Schwersenky for a valuable consideration paid to his by Israel Berger conveyed by warranty deed lot 15 to Louis Fiedelman which was recorded March 5, 1927.
>
> That on September 13, 1927, Israe (Israel) Berger procured Davis and Anna Fiedelman to execute a warranty deed to Bessie Berger of lot 15, which was recorded September 14, 1927.
>
> That on January 11, 1928, Bessie Berger conveyed by warranty deed the two lots, 15 and 16, to Louis Fiedelman, which deed was recorded January 12, 1928.
>
> That on November 6, 1928, Leon Bloomfield, a bachelor, conveyed lots 15 and 16 by warranty deed to Israel Berger, the husband of Bessie Berger, which was recorded July 26, 1929.
>
> That Israel Berger at the time of the last conveyance said Leon Bloomfield a consideration of $1700.00, which was the money of Bessie Berger.
>
> That at the time of the conveyance by Louis Fiedelman to Israel Berger the property was subject to an aggregate of $18,000.00 in mortgages and other liens of record; that Israel Berger became possessor of the legal title of the premises in question.
>
> That at the time of the conveyance by Leon Fiedelman to Israel Berger an agreement was entered into between Israel and Bessie Berger on the one hand and Israel and Tillie Berger wherein Israel and Tillie agreed to collect the rents and profits from the premises in question and apply them to the

payment of insurance, repairs, taxes, interest, etc; that Leon Fiedelman surrendered all rights and possession to the said premises.

That by reason of the payment of $1769. to Leon Fiedelman, Bessie Berger became entitled to and was possessed of an equitable interest in the premises; that on or about July 20, 1914, Bessie Berger, believing that she had a right to change the name in said deed, caused to be erased therefrom the name of Isaac Berger and inserted therein the name of herself and then filed the deed for record on July 25, 1914; that the erasure of the name and substitution of her name was not done for a fraudulent purpose but in a mistaken and honest belief that the title to the premises could be thereby conveyed to her.

That on June 1, 1915, Isaac and Bessie Berger executed a warranty deed of lots 15 and 16 to Bessie Berger; that pursuant to said conveyance the legal as well as the equitable title became vested in Bessie Berger as against the defendant, George Young.

That from June 9, 1915, when the bill was filed Bessie Berger through her agent Israel Berger was in disputed possession of the premises.

That the property was subsequently sold under a judgment obtained by one Barney Greenspahn and on February 8, 1915, redeemed by Bessie Berger by the payment by her of $414.78.

That in a certain suit in the Municipal Court by Minnie Lowe against Emelie Eastman and Louis Chatkin, Jr. judgment was obtained and a levy made on the interest of Emelie Eastman in lots 15 and 16 and the property sold to Lillian Chatkin; that the certificate of sale and deed were issued and on April 20, 1915, the property was conveyed by the grantee thereunder to Bessie Berger; that the consideration paid therefor by Bessie Berger was the sum of $450.00.

That on April 23, 1915, a judgment by confession of Israel Berger was entered in favor of George Young in the sum of $7578.50 in the Superior Court of Cook County which was without consideration. That the notes upon which the judgment was entered were executed and delivered by Israel Berger to Young with the intent to cheat and defraud Bessie Berger by thereafter confessing judgment and making pretended redemption of the premises; that it was the intention of Israel Berger and George Young that the latter would reconvey to Israel Berger; that although an execution was issued and a deposit made by Young it was all in pursuance of a fraudulent scheme to defraud Bessie Berger and place a cloud on the title of the premises in question; that all the proceedings pursuant to the confession of judgment are null and void and should be vacated and set aside as to her that the court has jurisdiction of the subject-matter and all the parties to the cause.

That the said conveyance from Leon Fiedelman to Israel Berger by way of warranty deed and the said

payment of insurance, repairs, taxes, interest, etc; that Leon Kledaman surrendered all rights and possession to the said premises.

That by reason of the payment of $1750. to Leon Kledaman, Beatie Berger became entitled to and was possessed of an equitable interest in the premises; that on or about July 30, 1918, Beatie Berger, believing that she had a right to change the name in said deed, caused to be erased therefrom the name of Isaac Berger and inserted therein the name of herself and then filed the deed for record on July 22, 1918; that the erasure of the name and substitution of her name was not done for a fraudulent purpose but in a mistaken and honest belief that the title to the premises could be thereby conveyed to her.

That on June 1, 1918, Isaac and Beatie Berger executed a warranty deed of lots 18 and 16 to Beatie Berger; that payment of said conveyance the legal as well as the equitable title became vested in Beatie Berger as against the defendant, George Young.

That from June 9, 1918, when the kid was first Beatie Berger through her agent Israel Berger was in disputed possession of the premises.

That the property was subsequently sold under a judgment obtained by one [illegible] on [illegible] February 3, 1919, redeemed by Beatie Berger by the payment by her of $912.79.

That in a certain suit in the Municipal Court by Kranic Isre against Beatie Berger and Louis Charkin, Jr. judgment was obtained and a levy made on the interest of Beatie Berger in lots 18 and 16 and the property sold to Julian Charkin; that the certificate of sale and deed were issued and on April 30, 1919, the property was conveyed by the grantee thereunder to Beatie Berger; that the consideration paid therefor by Beatie Berger was the sum of $650.00.

That on April 22, 1919, a judgment by confession of Israel Berger was entered in favor of George Young in the sum of $2234.30 in the Superior Court of Cook County which was without consideration. That the notice upon which the judgment was entered were executed and delivered by Israel Berger to Young with the intent to assist and defraud Beatie Berger by therefrom confirming judgment and making the protected possession of the premises; that it was the intention of Israel Berger and George Young that the latter would reconvey to Israel Berger; that the latter would reconvey to Israel Berger; that although no consideration was paid or a deposit made by Young it was all in pursuance of a fraudulent scheme to defraud Beatie Berger and give a joint scheme to defraud Beatie Berger and give a claim on the title of the premises in question; that all the proceedings pertaining to the confession of judgment are null and void and should be vacated and set aside so to hold that the court has jurisdiction of the subject-matter and all the parties to the cause.

That the said conveyance from Leon Kledaman to Israel Berger by way of warranty deed and the said

conveyance from Israel Berger and Bessie Berger to Bessie Berger by way of warranty deed were and each of them in the nature of a mortgage and that the indebtedness secured thereby has not been paid but that the court does not attempt to find the amount or amounts due thereon, and that the amount or amounts due thereon are expressly left undetermined and undecided as not being within the issues of this cause."

The decree then determines that the deed be set aside and declared null and void as a cloud on the title of Bessie Berger and that it be delivered up to be cancelled by the clerk of the court.

The bill of complaint in the instant case which was filed by Israel and Tillie Berger on January 5, 1920, in the Superior Court - after setting forth a chain of title to lots 15 and 16 and reciting the contents of the decree in the Circuit Court in the case of Bessie Berger v. Israel Young, and the decree in a case entitled Greenspahn v. Berger, and alleging also an ejectment suit begun by Bessie Berger against Israel and Tillie Berger in which Bessie Berger obtained judgment for possession of "the second flat in front of the premises known as 1037 South Racine Avenue, Chicago" - prays that the defendants Bessie Berger and Peters, the sheriff, be restrained from dispossessing the complainants, Israel and Tillie Berger, from the premises in question, and that they have such other further relief in the premises as is equitable.

To the bill of complaint in the instant case the defendant, Bessie Berger, filed an answer, and on June 24, 1920, filed her cross bill. By her cross bill she seeks to have an affidavit of Israel Berger, which on January 7, 1920, was recorded in the Recorder's office set as a cloud upon her title and declared to be null and void. That affidavit signed

conveyance from Israel Berger and Essie Berger to Bessie Berger by way of warranty deed were and each of them in the nature of a mortgage and that the indebtedness secured thereby has not been paid but that the court does not attempt to find the amount or amounts due thereon, and that the amount or amounts due thereon are expressly left undetermined and undecided as not being within the issues of this cause."

The decree then determines that the deed be set aside and declared null and void as a cloud on the title of Bessie Berger and that it be delivered up to be cancelled by the clerk of the court.

The bill of complaint in the instant case which was filed by Israel and Zillie Berger on January 8, 1940, in the Superior Court - after setting forth a chain of title to lots 15 and 16 and recalling the existence of the decree in the Circuit Court in the case of Bessie Berger v. Israel Young, and the decree in a case entitled Greenspahn v. Berger, and alleging also an abstract suit begun by Bessie Berger against Israel and Zillie Berger in which Bessie Berger obtained judgment for possession of "the second flat in front of the premises known as 1027 South Hoyne Avenue, Chicago" - prays that the defendants Bessie Berger and Peters, the sheriff, be restrained from dispossessing the complainants, Israel and Zillie Berger, from the premises in question, and that they have such other further relief in the premises as is equitable.

In the bill of complaint in the instant case the defendant, Bessie Berger, filed an answer, on June 24, 1940, filed her cross bill. By her cross bill she seeks to have an affidavit of Israel Berger, which on January 7, 1940, was recorded in the Recorder's office set as a cloud upon her title and declared to be null and void. That affidavit alleged

by Israel Berger undertakes to recite the history of the title to the property in question. It recites among other things, that he, Israel Berger, "upon request of Leon Fiedelman made a deed from Leon Fiedelman to Isaac Berger the brother of this affiant (Israel Berger) which deed Isaac Berger promised to hold and not record the same" until a certain suit had been disposed of; it then recites further the alteration in the name of Isaac Berger by Bessie Berger, and, also, recites the entry of the decree on May 19, 1917, in the suit of Bessie Berger v. Israel Berger and Young, and sets up "that accordingly upon the payment to said Bessie Berger by affiant of the amounts due her, all her interest in said property ceases and is determined and the property then becomes solely the property of the affiant only and clear of any right of lien which Bessie Berger has or claims to have in said property." The affidavit admits that Bessie Berger obtained judgment in ejectment against the affiant, Israel Berger.

The function of the affidavit, as recorded, was to give notice that Bessie Berger is merely entitled to a lien on the property and that Israel Berger himself is the real owner.

There was a reference to a Master before whom evidence was taken, and a report made by him, which was subsequently approved by the court. Exceptions thereto were overruled, and on March 25, 1921, a decree was entered finding all the material allegations in the cross bill of Bessie Berger to be true; that the affidavit of Israel Berger constitutes a cloud upon her title in and to the premises in question; that Bessie Berger at the time of the filing of the cross bill of complaint in the

by Israel Berger undertakes to recite the history of the title to the property in question. It recites among other things, that he, Israel Berger, "upon request of Jane Bladesman made a deed from Jane Bladesman to Isaac Berger the brother of this affiant (Israel Berger) which deed Isaac Berger proceeded to hold and not convey the same" until a certain suit had been disposed of; it then recites further the alteration in the name of Isaac Berger by Bessie Berger, and, also, recites the entry of the decree on May 10, 1917, in the suit of Bessie Berger v. Israel Berger and Young, and sets up "that accordingly upon the payment to said Bessie Berger by affiant of the amounts due her, all her interest in said property ceases and is determined and the property then becomes solely the property of the affiant only and clear of any right or lien which Bessie Berger has or claims to have in said property." The affidavit admits that Bessie Berger obtained judgment in attachment against the affiant, Israel Berger.

The function of the affidavit, as recorded, was to give notice that Bessie Berger is merely entitled to a lien on the property and that Israel Berger himself is the real owner.

There was a reference to a master before whom evidence was taken, and a report made by him, which was subsequently approved by the court. Exceptions thereto were overruled, and on March 25, 1921, a decree was entered finding, all the material allegations in the cross bill of Bessie Berger to be true; that the affidavit of Israel Berger constitutes a cloud upon her title in and to the premises in question; that Bessie Berger at the time of the filing of the cross bill of complaint in the

instant case was the owner and seized in fee simple and in possession of lots 15 and 16; that paragraph 34 of the former decree - in the case of Berger v. Berger and Young, in the Circuit Court, that certain warranty deeds were in the nature of mortgages - was merely a conclusion of law and not a finding of fact, and was not within the issues of that cause and was inconsistent with the finding of ownership in Bessie Berger as found by that decree; that neither Israel Berger, Tillie Berger nor Leon Fiedelman have any right, title or interest in and to the property in question. That decree ordered that the affidavit in question be declared to be a cloud upon the title of Bessie Berger and that said instrument in writing and "said paragraph 34" be and they are hereby declared null and void against the title of said Bessie Berger, etc. and that the bill of complaint of Israel Berger and Tillie Berger be dismissed for want of equity. To reverse that decree this writ of error is prosecuted.

It will be observed that by the decree in the former suit the Circuit Court held that the legal and equitable title had become vested in Bessie Berger; that the Sheriff's deed to Young was a cloud on her title and should be set aside; that the conveyance by Fiedelman to Isaac Berger, and the "conveyance from Isaac Berger and Bessie Berger by way of warranty deed were and each of them, in the nature of a mortgage and that the indebtedness secured thereby has not been paid but the court does not attempt to find the amount or amounts due thereof." One of the questions that arise herein is whether as against Israel Berger the decree in the suit in the Circuit Court, which was in favor of Bessie Berger and against Israel Berger and Young is <u>res adjudicata</u> as to the claim of Israel

instant case was the owner and seised in fee simple and in possession of lots 15 and 16; that paragraph 34 of the former decree - in the case of Berger v. Berger and Young, in the Circuit Court, that certain warranty deeds were in the nature of mortgages - was merely a conclusion of law and not a finding of fact, and was not within the issues of that cause and was inconsistent with the finding of ownership in Bessie Berger as found by that decree; that neither Israel Berger, Tillie Berger nor Isaac Mickelson have any right, title or interest in and to the property in question. That decree ordered that the affidavit in question be declared to be a cloud upon the title of Bessie Berger and that said instrument in writing and "said paragraph 34" be and they are hereby declared null and void against the title of said Bessie Berger, etc. And that the bill of complaint of Israel Berger and Tillie Berger be dismissed for want of equity. To reverse that decree this writ of error is prosecuted.

It will be observed that by the decree in the former suit the Circuit Court held that the legal and equitable title had become vested in Bessie Berger; that the Sheriff's deed to Young was a cloud on her title and should be set aside; that the conveyance by Mickelson to Isaac Berger, and the "conveyance from Isaac Berger and Bessie Berger by way of warranty deed were and each of them, in the nature of a mortgage and that the indebtedness secured thereby has not been paid but the court does not attempt to find the amount or amounts due thereof." One of the questions that arise herein is whether as against Israel Berger the decree in the suit in the Circuit Court, which was in favor of Bessie Berger and against Israel Berger and Young is res adjudicata as to the claim of Israel

Berger in the instant case. In this case he claims that she is only a mortgagee, and he prays for relief on that theory.

If the former case properly involved an adjudication of the title, qua title, as between Bessie Berger and Israel Berger and Young, and decreed that the legal and equitable title were in her then it could be pleaded in bar to the present suit.

It is the claim on behalf of Israel Berger that he could not be bound by the findings or decree in the former case for the reason that the only issue therein was whether the claim of Young was a cloud on the title as far as the interest of Bessie Berger was concerned. On the other hand it is claimed on behalf of Bessie Berger that according to the text of the decree in the former case it was therein adjudicated that Bessie Berger was the legal and equitable owner of the property; that - because it is the law that in order to be entitled to remove a cloud one must aver and prove that he is the owner of the property from which it is sought to remove the cloud - the ownership of the property - was one of the issues in the former case which the court was bound to determine, that is, whether Bessie Berger was the owner of the property in question.

An examination of the pleadings in the former case and a determination of the particular issue precipitated thereby, discloses that on their face the only ultimate issue was whether the sheriff's deed to Young was a cloud on the title of Bessie Berger and whether as to her it should be set aside and vacated. It may be said that that issue by itself, no matter how determined, would not affect the rights of Israel Berger in the property in question; in other words, that there

Berger in the instant case. In this case he claims that she is only a mortgagee, and he prays for relief on that theory.

If the former case primarily involved an adjudication of the title, our title, as between Bessie Berger and Lerael Berger and Young, and decreed that the legal and equitable title were in her then it could be pleaded in her to the present suit.

It is the claim on behalf of Lerael Berger that he could not be bound by the findings or decree in the former case for the reason that the only issue therein was whether the claim of Young was a cloud on the title as far as the interest of Bessie Berger was concerned. In the other hand it is claimed on behalf of Bessie Berger that according to the text of the decree in the former case it must therefore adjudicated that Bessie Berger was the legal and equitable owner of the property; that - because it is the law that in order to be entitled to remove a cloud one must over and above that he is the owner of the property from which it is sought to remove the cloud - the ownership of the property - was one of the issues in the former case which the court was bound to determine, that is, whether Bessie Berger was the owner of the property in question.

An examination of the pleadings in the former case and a determination of the particular issue precipitated thereby, discloses that on their face the only ultimate issue was whether the sheriff's deed to Young was a cloud on the title of Bessie Berger and whether as to her it should be set aside and vacated. It may be said that that issue by itself, no matter how determined, would not affect the rights of Lerael Berger in the property in question; in other words, that there

was no issue in the former case as to any matters between Bessie Berger and Israel Berger. But in Ely v. Brown, 183 Ill. 575, the court said, "This being a bill of the appellees to remove clouds from their title they must aver and must prove that they are the owners of the property from which it is sought to remove the clouds alleged to exist." Judson v. Glos, 249 Ill. 82. That means that ownership is a prerequisite to filing a bill to remove a cloud. Accordingly, as the law considers it essential in such a suit that the complainant must first show title, we feel bound, in the instant case, to consider the decree in the Berger v. Young case as adjudicating and establishing not only that the sheriff's deed to Young was a cloud, but, also that Bessie Berger was the owner of the property in question. That decree was not appealed from or reviewed and so is decisive.

It is true that paragraph 34 of the decree in the former suit purports to find that certain conveyances, one from Leon Fiedelman to Israel Berger and one from Israel Berger and Bessie Berger to Bessie Berger, each of which was a warranty deed "were, and each of them, in the nature of a mortgage and that the indebtedness secured thereby has not been paid" etc. In a measure that seems inconsistent with the assumption that the court had jurisdiction by reason of proof that Bessie Berger had title to the premises, a title greater than that of a mortgagee. But an examination of the proceedings in the former case discloses that no claim was made by Israel Berger that Bessie Berger was a mortgagee of the property in question; in fact he claimed in his answer that Bessie Berger had no interest whatever, that he was indebted to George Young and that the latter was the owner of the property. There is no doubt some conflict between the finding

was no issue in the former case as to any matters between Bessie Berger and Israel Berger. But in Ely v. Brown, 184 III. 278, the court said, "This being a bill of the appellees to remove clouds from their title they must aver and must prove that they are the owners of the property from which it is sought to remove the clouds alleged to exist." Judson v. Olds, 249 III. 32. That means that ownership is a prerequisite to filing a bill to remove a cloud. Accordingly, as the law considers it essential in such a suit that the complainant must first show title, we find found, in the instant case, to consider the decree in the Berger v. Young case as adjudicating and establishing not only that the sheriff's deed to Young was a cloud, but, also that Bessie Berger was the owner of the property; complainant v. Bessie case was not appealed from or reviewed and so is decisive.

It is true that paragraph 24 of the decree in the former suit purports to find the certain conveyances, one from Leon Kledaisen to Israel Berger and one from Israel Berger and Bessie Berger to Bessie Berger, each of which was a warranty deed "were, and each of them, in the nature of a mortgage and that the indebtedness secured thereby has not been paid" etc. In a measure that seems inconsistent with the assumption that the court had jurisdiction by reason of proof that Bessie Berger had title to the premises, a title superior than that of a mortgagee. But on examination of the proceedings in the former case disclosed that no claim was made by Israel Berger that Bessie Berger was a mortgagee of the property in question; in fact he claimed in his answer that Bessie Berger had no interest whatever, that he was indebted to George Young and that the latter was the owner of the property. There is no doubt some conflict between the finding

on the one hand that the conveyance of Leon Fiedelman to Isaac Berger and Isaac Berger and Bessie Berger to Bessie Berger were in the nature of mortgages, and the finding, on the other, that it had jurisdiction to remove a cloud and that Bessie Berger had the legal and equitable title, and directing the cancellation of the Young deed. In view, however, of the substance of the decree, we consider the finding as to certain deeds being in the nature of mortgages as negligible, and that the decree in the former case must be considered as having determined as against Israel Berger that Bessie Berger was the owner ofthe premises in question.

Further, and in itself a sufficient reason for confirming the decree in the instant case, the evidence in the former suit showed that Israel Berger, together with George Young, conspired to cheat and defraud Bessie Berger, by means of fraudulent notes and a confession of judgment and proceedings thereunder, including a sheriff's deed, out of whatever interest she had in the property.

The decree in that case, which remains in full force and effect determined expressly that Israel Berger had attempted by a deliberate fraud to cheat Bessie Berger out of whatever interests she had in the property in question, and, as a consequence of that fraud, ordered the judgment vacated and the Sheriff's deed to Young removed as a cloud on her title. Israel Berger in the Bessie Berger v. Young suit denied in toto any title whatsoever in Bessie Berger and asserted title in Young, his co-conspirator. He claimed that Young was the owner; he now claims that he, himself, is the owner. In the former suit he claimed that Bessie Berger had no right or title whatever; he now claims

on the one hand that the conveyance of Leon Kloeblen to Isaac Berger and Isaac Berger and Noele Berger to Pauls Berger were in the nature of mortgages, and the finding, on the other, that it had jurisdiction to remove a cloud and that Noele Berger had the legal and equitable title, and directing the cancellation of the lower deed. In view, however, of the substance of the decree, we consider the finding as to certain deeds being in the nature of mortgages as negligible, and that the decree in the former case must be considered as having determined as against Isaac Berger that Noele Berger was the owner of the premises in question.

Further, and in itself a sufficient reason for confirming the decree in the instant case, the evidence in the former suit showed that Isaac Berger, together with George Young, conspired to cheat and defraud Noele Berger, by means of fraudulent notes and a confederation of judgment and proceedings thereunder, involving a sale of her property, in which interest she had in the property.

The decree in that case, which remains in full force and effect determined conclusively that Isaac Berger had attempted by a malicious fraud to cheat Noele Berger out of a valuable interest she had in the property in question, and, as a consequence of that fraud, obtained the judgment vacated and the sheriff's deed to Young received as a cloud on her title. Isaac Berger in the Noele Berger v. Young suit denied in toto any title whatsoever in Noele Berger and asserted title in Young, by adverse possession. He claimed that Young was the owner; he was [illegible] himself, is the owner. In the former suit, he did not [illegible] Noele Berger had no right or title whatever; he [illegible]

that she is in the nature of a mortgagee. Certainly in view of the decree in the former case and the duplicity and fraud of Israel Berger, this court will not entertain Israel Berger in his claim that Bessie Berger is now only a mortgagee of the property and that he is the legal owner. He who asks equitable relief concerning a situation about which he has been adjudicated guilty of fraud invites rebuke, not help. He is both morally and legally estopped. Messler v. Jacobs, 66 Ill. App. 571.

Further an examination of the bill of complaint as amended, in the instant case, shows that it is claimed that Bessie Berger is a mortgagee, and also, it is claimed in the alternative, that there was an express trust of the property in favor of Israel Berger. The finding of the Master on that subject, which was approved by the Chancellor is as follows:

> "The bill of complaint, as amended, appears to be drawn with a double aspect. In one aspect, it is a bill to declare the conveyances to Isaac Berger and to Bessie Berger to be mortgages, and in its other aspect, it is a bill to declare an express trust in said premises, in favor of Israel Berger.
>
> On the first proposition, that it is a bill to declare the conveyances in question to be mortgages, I find that the allegations in the bill are not supported by the evidence; indeed, I find that the evidence of Israel Berger and his daughter, Mrs. Ida Benjamin, is in direct contradiction of this theory of the case.
>
> Israel Berger testified:
>
> Q. Now, when Fiedelman executed the deed to Isaac Berger - how did that happen?
>
> A. It was done at my request.
>
> Q. Did you tell him to make the deed?
>
> A. Yes, sir.
>
> Q. Did you get any money for that?
>
> A. No, sir; no consideration was paid.
>
> Q. What did Isaac Berger say he would do with the deed?
>
> A. He said he would hold it for me.
>
> Mrs. Ida Benjamin, complainant's daughter, testified:
>
> Isaac Berger was going to leave the room, and my father called him back and asked him if he would not take up a deed to the property at that time, but he

that she is in the nature of a mortgagee. Certainly in view of the decree in the former case and the validity and fraud of Israel Berger, this court will not entertain Israel Berger in his claim that Bessie Berger is now only a mortgagee of the property and that he is the legal owner. He who seeks equitable relief concerning a situation upon which he has been adjudicated guilty of fraud invites rebuke, not help. He is both morally and legally estopped. Bassler v. Bassler, 65 III. App. 671.

Further an examination of the bill of complaint as amended, in Stipulated case, shows that it is claimed that Bessie Berger is a mortgagee, and also, it is claimed in the alternative, that there was an express trust of the property in favor of Israel Berger. The finding of the Master on that subject, which was approved by the Commissioner is as follows:

> "The bill of complaint, as amended, appears to be drawn with a double aspect. In one aspect, it is a bill to declare the conveyances to Isaac Berger and to Bessie Berger to be mortgages, and in the other aspect, it is a bill to declare an express trust in said premises, in favor of Israel Berger.
>
> On the first proposition, that it is a bill to declare the conveyances in question to be mortgages, I find that the allegations in the bill are not supported by the evidence; indeed, I find that the evidence of Israel Berger and his daughter, Mrs. Benjamin, is in direct contradiction of this theory of the case.
>
> Israel Berger testified:
>
> Q. Now, when Mordecai executed the deed to Isaac Berger - why did that happen?
>
> A. It was done at my request.
>
> Q. And you told him to make the deed?
>
> A. Yes, sir.
>
> Q. Did you get any money, for that?
>
> A. No, sir; no consideration was paid.
>
> Q. What did Isaac Berger say he would do with the deed?
>
> A. He said he would hold it for me.
>
> Mrs. Benjamin, complainant's daughter, testified:
>
> Isaac Berger was going to leave the room, so my father called him back and said that he would not take up a deed to his property at all times. But he

did not want to take it, and my father insisted - he asked him if he would not take the deed. Leon Fiedelman was ready to get married and he said he didn't want to take the property. He (Israel Berger) said: 'If you can't keep the deed, I will take it from you and give it to my brother;' and he called Isaac Berger back and aked him if he would not take it, and he said 'No;' and Israel said; 'There is no one nearer and dearer than you, and I know I will get it back pretty soon, keep it, but don't record it! I was there at the time the deed was transferred to him; he finally said, 'I will take it as a favor to you, and keep the title to the property;' the grantee in the deed was Isaac Berger. He (Israel Berger) said he intended to give the deed to his brother (Isaac Berger) because he trusted him. (Rec. 181 and 182.)

There is no evidence offered by the complainants tending to show any indebtedness of the complainants to either Isaac or Bessie Berger. On the other hand, Isaac Berger stoutly denied the above statements as to the circumstances under which the deed was executed and delivered to him, and he seemed to me, under all the circumstances, to be the more credible witness.

As to the other aspect, that the bill is one to establish an express trust in the premises in question in favor of Israel Berger, and against the defendant, Bessie Berger, I find that the Statute of Frauds has been pleaded, and that inasmuch as the entire transaction rests in parol and that said trust, if it were to be found established, must be wholly based upon oral testimony, I must conclude that the statute is a bar thereto.

However, I have considered the evidence offered by both parties bearing on the question of an express trust, and am of the opinion that aside from the defense of the statute itself, that the complainant has not established this aspect of his bill by a preponderance of the evidence. I have heretofore already indicated that Israel Berger has not appeared to me to be a credible witness." etc. Williams v. Williams, 180 Ill. 361.

We have examined the evidence and are of the opinion that the findings of the Master were entirely justified. Inview of what the record shows,-the findings and decree in the suit in the Circuit Court, the adjudication of fraud on the part of Israel Berger, and the failure to establish an express trust,- we are of the opinion that the decree herein should be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

did not want to take it, and my father insisted - he asked him if he would not take the deed. Isaac Tiedeman was ready to get married and he said he didn't want to take the property. He (Israel Berger) said: 'If you don't keep the deed, I will take it from you and give it to my brother;' and he called Isaac Berger back and asked him if he would not take it, and he said 'No;' and Israel said; 'There is no one nearer and dearer than you, and I know I will get it back pretty soon, keep it, but don't record it! I was there at the time the deed was transferred to him; he finally said, 'I will take it as a favor to you, and keep the title to the property;' the grantee in the deed was Isaac Berger. He (Israel Berger) said he intended to give the deed to his brother (Isaac Berger) because he trusted him. (Rec. 181 and 182.)

There is no evidence offered by the complainants tending to show any indebtedness of the complainants to either Isaac or Jacob Berger. On the other hand, Isaac Berger emphatically denied the more statements as to the circumstances under which the deed was executed and delivered to him, and he seemed to me, under all the circumstances, to be the more credible witness.

As to the other ground, that the bill is one to establish an express trust in the premises in question in favor of Israel Berger, and against the defendant, Jacob Berger, I find that the results of trusts has been pleaded, and that inasmuch as the entire transaction rests in parol and that such trust, if it were to be found established, must be wholly based upon oral testimony, I must conclude that the bill is a bar thereto.

However, I have considered the evidence offered by both parties bearing on the question of an express trust, and on of the ground that aside from the defense of the statute itself, that the complainant has not established this aspect of his bill by a preponderance of the evidence. I have heretofore already indicated that Israel Berger has not appeared to me to be a credible witness, etc. Williams v. Williams, 18N J.Eq. 361.

We have examined the evidence and are of the opinion that the findings of the Master were entirely justified. Review of what the record shows,-the findings are borne in the suit in the Circuit Court, the substantiation of fraud on the part of Israel Berger, and the failure to establish an express trust,- we are of the opinion that the decree herein should be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. DISSENT.

259 - 27217

C. W. HOWE doing business as
C. W. HOWE AND COMPANY,

Appellee,

v.

STEGER & SONS PIANO MFG. COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 611

Opinion filed Nov. 29, 1922.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant from a judgment entered against it in the sum of $13836.27, for want of a satisfactory affidavit of merits.

On January 26, 1921, the plaintiff C. W. Howe filed a statement of claim alleging substantially the following:- That for four months or more prior to May 20, 1919, he was employed by the defendant "to get customers for phonographic cabinets, to be made and furnished to certain customers by the defendant, at a commission of 50¢ per cabinet for small cabinets and $1 per cabinet for large sized cabinets to be paid by defendant to plaintiff on securing the orders for customers which were acceptable and accepted by defendant"; that prior to May 20, 1919, he secured and delivered to the defendants orders for cabinets as follows:-

Nightingale Mfg. Co.,	3000	cabinets	@ 50¢	ea.	$1500.00
Gt. Eastern Mfgrs.	3500	cabinets	50¢	ea.	1750.00
Cumming-Forster Corp.	1000	small	50¢	ea.	500.00
	4000	large	$1	ea.	4000.00
Playerphone T.M.Co.	2000	small	50¢	ea.	1000.00
	3000	large	$1	ea.	3000.00
Mack M. Burnstine	2000	cabinets	$1	ea.	2000.00
					$13,750.00

C. W. HOWE doing business as
C. W. HOWE AND COMPANY,

Appellee,

v.

STROMBERG & HOBBS PIANO MFG. COMPANY,
a corporation,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant from a judgment entered against it in the sum of $1,888.87, for want of a satisfactory affidavit of merits.

On January 20, 1921, the plaintiff C. W. Howe filed a statement of claim alleging substantially the following:- That for four months or more prior to May 20, 1919, he was employed by the defendant "to get contracts for phonographic cabinets, to be made and furnished to certain customers by the defendant, at a commission of 30% per cabinet for small cabinets and $1 per cabinet for large mixed cabinets to be paid by defendant to plaintiff on securing the orders for customers which were acceptable and accepted by defendant"; that prior to May 20, 1919, he secured and delivered to the defendants orders for cabinets as follows:-

Nightingale Mfg. Co.,	3000 cabinets	@ 30¢ ea.		$900.00
C. Eastern Mfgs.	3500 cabinets	30¢ ea.		1,050.00
Gumming-Forster Corp.	1000 small	30¢ ea.		300.00
	4000 large	$1 ea.		4000.00
Playerphone I.M.Co.	3000 small	30¢ ea.		900.00
	3000 large	$1 ea.		3000.00
Mack H. Martelle	2000 cabinets	$1 ea.		2000.00
				$15,150.00

That all of the cabinets so sold were to be delivered to the customers within sixty days after the time of the order and all deliveries completed by November 1, 1919; that the orders in the above table were accepted by the defendant and some cabinets delivered on each order; that none of the orders was ever cancelled and that the customers insisted upon delivery and stood ready and willing to accept deliveries and pay for them; that the defendant through its own fault neglected and refused to deliver all of said cabinets. That the total commissions earned were $13,750.00 upon which the plaintiff has been paid $879.00, leaving a balance due him of $12,871.00.

Two affidavits of merits which were filed by the defendant were, apparently, stricken. The record does not show what they contained. A third amended affidavit of merits was filed on May 20, 1921. It is a document containing nineteen typewritten pages.

The trial judge on motion of counsel for the plaintiff struck it from the files on the ground that it did not set up a sufficient defense and entered judgment on the statement of claim in the sum of $13,836.27. The only question upon this appeal is the sufficiency of the third affidavit of merits.

In paragraph 2 of the affidavit of merits the defendant alleges that it employed the plaintiff to get customers for cabinets, to be made and delivered by it and agreed to pay a commission of fifty cents per cabinet for small sizes, and one dollar for large, but - and this shows a different contract from that set up in the statement of claim - "on such cabinets as were delivered to said customers and paid for by said cus-

That all of the cabinets so sold were to be delivered to the customers within sixty days after the time of the order and all deliveries completed by November 1, 1919; that the orders in the above table were accepted by the defendant and some cabinets delivered on such order; that none of the orders was ever cancelled and that the customers insisted upon delivery and stood ready and willing to accept deliveries and pay for them; that the defendant through its own fault neglected and refused to deliver all of said cabinets. That the total consideration earned were $13,750.00 upon which the plaintiff has been paid $5375.00, leaving a balance due him of $13,371.00.

Two affidavits of merits which were filed by the defendant were, apparently, stricken. The record does not show what they contained. A third amended affidavit of merits was filed on May 30, 1921. It is a document containing nineteen typewritten pages.

The trial judge on motion of counsel for the plaintiff struck it from the files on the ground that it did not set up a sufficient defense and entered judgment on the statement of claim in the sum of $13,358.47. The only question upon this appeal is the sufficiency of the third affidavit of merits.

In paragraph 2 of the affidavit of merits the defendant alleges that it employed the plaintiff to get customers for cabinets, to be made and delivered by it and agreed to pay a commission of fifty cents per cabinet for small sizes, and one dollar for large, but - and this shows a different contract from that set up in the statement of claim - "on such cabinets as were delivered to said customers and paid for by said cus-

tomers" and "no commissions were to accrue or to be earned or to be due and payable" * * * "unless and until payment was made to defendant for phonograph cabinets delivered, and that said commissions were to be only on such cabinets as were actually paid for by said customers in cash."

It will be observed that this promise to pay the plaintiff is quite different from the promise to pay which is set up in the statement of claim. Further, paragraph 2, recites that the contract with the plaintiff provided that the customers "were to establish and maintain, during the continuance of the contract" * * * "credit-standing satisfactory to the defendant, and that the defendant was to be under no obligations to manufacture or to continue to manufacture, or to ship or deliver, or to continue to ship or deliver, cabinets under any order secured by the plaintiff for said defendant from any of said customers if credit satisfactory to defendant was not established by such customers in any case, or if the credit established was not maintained as aforesaid in a manner satisfactory to thedefendant, or if said customer in any case failed to pay for said cabinets in accordance with the terms of the contract made or to be made between defendant and said customers" That paragraph then denies that any commissions were due or to become due to plaintiff merely upon the securing of orders from customers which were acceptable to, and accepted by defendant.

In paragraph 3 of the affidavit of merits, the defendant admits that the plaintiff secured customers as recited in the statement of claim, and that those customers placed orders with the defendant, as stated in the statement of claim, but it sets up that the total amount paid by such customers pursuant

tomers" and "no commissions were to accrue or to be earned or to be due and payable" * * * "unless and until payment was made to defendant for phonograph cabinets delivered, and that said commissions were to be only on such cabinets as were actually paid for by said customers in cash."

It will be observed that this promise to pay the plaintiff is quite different from the promise to pay which is set up in the statement of claim. Further, paragraph 6, recites that the contract with the plaintiff provided that the customers "were to establish and maintain, during the continuance of the contract" * * * "credit-standing satisfactory to the defendant, and that the defendant was to be under no obligations to manufacture or to continue to manufacture, or to ship or deliver, or to continue to ship or deliver, cabinets under any order received by the plaintiff for said defendant from any of said customers if credit satisfactory to defendant was not established by such customers in any case, or if the credit established was not maintained as aforesaid in a manner satisfactory to the defendant, or if said customer in any case failed to pay for said cabinets in accordance with the terms of the contract made or to be made between defendant and said customer." That paragraph then proceeds that any cancellations were due or to become due to plaintiff merely upon the securing of orders from customers which were accepted by, and accepted by defendant.

In paragraph 8 of the statement of merits, the defendant admits that the plaintiff secured customers as recited in the statement of claim, and that those customers placed orders with the defendant, as stated in the statement of claim, but it sets up that the total amount paid by such customers pursuant

to those orders, was such an amount, that the plaintiff only earned commissions, at the contract rate, in the sum of $1475.50, and having been paid $879.00, there is now due him only $596.50, which the defendant is ready and offers to pay.

In paragraph 4 the defendant denies that all the cabinets sold by the defendant were to be delivered by November 1, 1919. It also states that some cabinets were delivered on each of the orders mentioned in the plaintiff's statement of claim with the exception of the order of Bernstine. It also denies that any of said orders were ever cancelled, and denies that said customers insisted upon the delivery of all the cabinets in their respective orders, and denies that said customers stood ready and willing to accept said deliveries and to pay for the same, but asserts that said customers, and each of them, refused, neglected and failed to take deliveries and pay for them in accordance with their respective orders and denies that through its own fault it has neglected and refused to deliver all of said cabinets, and avers that it has fully complied with the terms of said orders and was ever ready, able and willing to complete and fill same, and offered so to do.

The affidavit of merits then proceeds to recite in great detail the history of its negotiations with each of the five customers mentioned in the statement of claim. In paragraph 5 the affidavit of merits recites as to the Nightingale Mfg. Co. that the defendant received an order on February 24, 1919, for 3000 cabinets, which order contained cutting specifications for the manufacture of 1500 of said cabinets and provided the cutting specifications for the manufacture and delivery of the balance, to-wit: 1500 were to follow; that said order provided that the cabinets would be delivered F.O.B. factory, Steger, Illinois in installments, 250 as early as poss-

to these orders, was much on account, that the plaintiff only earned commissions, at the contract rate, in the sum of $1475.50, and having been paid $875.00, there is now due him only $600.50, which the defendant is ready and offers to pay.

In paragraph 4 the defendant denies that all the cabinets sold by the defendant were to be delivered by November 1, 1919. It also states that some cabinets were delivered on each of the orders mentioned in the plaintiff's statement of claim with the exception of the order of Martenline. It also denies that any of said orders were ever cancelled, and denies that said customers insisted upon the delivery of all the cabinets in their respective orders, and denies that said customers stood ready and willing to accept said deliveries and to pay for the same, but asserts that said customers, and each of them, refused, neglected and failed to take deliveries and pay for them in accordance with their respective orders and denies that through its own fault it has neglected and refused to deliver all of said cabinets, and avers that it has fully complied with the terms of said orders and was ever ready, able and willing to complete and fill same, and offered so to do.

The affidavit of merits then proceeds to recite in great detail the history of its negotiations with each of the five customers mentioned in the statement of claim. In paragraph 6 the affidavit of merits refers as to the Slightsville Mfg. Co. that the defendant received an order on February 24, 1919, for 3000 cabinets, which order contained setting specifications for the manufacture of 1500 of said cabinets and provided the setting specifications for the manufacture and delivery of the balance, to-wit: 1500 were to follow; that said order provided that the cabinets could be delivered F.O.B. factory, Stamer, Illinois in instalments, 250 as early as pos-

ible or within 40 days, and a minimum of 250 per month until the aforesaid 1500 cabinets for which cutting specifications were given in said order were completed; that said order provided that the terms of payment were to be 2% for cash in 10 days or net 60 days, trade accetpance upon receipt of bill; that said order also provided that changes in the time of delivery or work would probably be necessary.

That paragraph recites that upon receipt of said order the defendant refused to accept it as it was offered because of the financial responsibility, standing and credit of the company not being satisfactory to the defendant, and made a counter proposition to the Nightingale Mfg. Co. which that company in March, 1919, accepted; that the Nightingale Mfg. Co. though often requested, failed to produce evidence or proof of its financial responsibility and standing or credit; that, subsequent to March, 1919, 203 cabinets were delivered to that company between May 29, 1919, and July 7, 1919, and were accepted and paid for by the Nightingale Mfg. Co. pursuant to the order so modified and in accordance with the terms thereof; that subsequently the defendant proceeded to manufacture and did manufacture additional cabinets to fill the order for the first mentioned 1500 cabinets, pursuant to and in accordance with the terms of the modified order and when the inability of the Nightingale Mfg. Co. to establish its credit continued and when consequently the original schedule of deliveries proposed by and in said order never became operative the defendant made deliveries to said company from time to time in amounts reasonably consistent with the company's ability to pay and extended a limited credit to it; that said arrangements were satisfactory to the Nightingale Mfg. Co. and pursuant thereto the defendant delivered to the Nightingale Mfg. Co. between

ible or within 60 days, and a minimum of 25% per month until the aforesaid 1500 cabinets for which certain specifications were given in said order were completed; that said order provided that the terms of payment were to be 2% for each in 10 days or net 30 days, trade acceptance upon receipt of bill; that said order also provided that changes in the time of delivery or work would probably be necessary.

That paragraph 2 recites that upon receipt of said order the defendant refused to accept it as it was offered because of the financial responsibility, standing and credit of the company not being satisfactory to the defendant, and made a counter proposition to the Kightlinger Mfg. Co. which that company in March, 1919, accepted; that the Kightlinger Mfg. Co. though often requested, failed to produce evidence or proof of its financial responsibility and standing or credit; that, subsequent to March, 1919, 3023 cabinets were delivered to that company between May 29, 1919, and July 7, 1919, and were accepted and paid for by the Kightlinger Mfg. Co. pursuant to the order as modified and in accordance with the terms thereof; that subsequently the defendant proceeded to manufacture and its manufacture additional cabinets to fill the order for the first mentioned 1500 cabinets, pursuant to and in accordance with the terms of the modified order and upon the inability of the Kightlinger Mfg. Co. to establish its credit continued and upon consequently the original acceptance of conditions proposed by and in said order never became operative the defendant made delivery to our company from time to time in amounts reasonably consistent with the company's ability to pay and extended a limited credit to it; that such arrangements were satisfactory to the Kightlinger Mfg. Co. and pursuant thereto the defendant delivered to the Kightlinger Mfg. Co. between

May 29, 1919, and March 4, 1920, 380 cabinets; that for said 380 cabinets the defendant was entitled to receive $11,364.89 but the Nightingale Mfg. Co. only paid in all the sum of $8037.54, leaving due the defendant $3127.35. That the Nightingale Mfg. Co. gave the defendant ten notes aggregating $3127.35, which notes were not accepted by the defendant as payment but only as evidence of and security for the balance due; that only the first two of said notes aggregating $625.47 were paid; that after the shipment of February 4, 1920, the credit of the Nightingale Mfg. Co. became so unsatisfactory that the defendant refused to deliver further cabinets except for cash; that the Nightingale Mfg. Co. agreed to that; that between January 6, 1920, and March 6, 1920, the defendant continually demanded that the Nightingale Mfg. Co. carry out its aforesaid order as modified; that on March 6, 1920, the defendant had on hand ready to deliver, and offered to deliver, 80 cabinets or any reasonable part thereof; that the Nightingale Mfg. Co. notified the defendant that it could not and would not accept said cabinets nor pay for them nor for any further cabinets; that the Nightingale Mfg. Co. was then virtually bankrupt and remained so; that no cutting specifications were ever given the defendant by the Nightingale Mfg. Co. for the second 1500 cabinets, so that the defendant could not even start the manufacture of them; that the Nightingale Mfg. Co. suffered a fire in September, 1919, which it stated resulted in great financial loss to it, and which it alleged was one of the causes for its inability to accept and pay for the cabinets theretofore manufactured; that on July 9, 1920, the Nightingale Mfg. Co. was duly adjudicated bankrupt; that the only payment the defendant has received on its claim is the sum of $255.77, for which it has given the plaintiff credit; that it has done everything

May 28, 1919, and March 4, 1920, 380 cabinets; that for said 380 cabinets the defendant was entitled to receive $11,354.82 but the Nightingale Mfg. Co. only paid in all the sum of $8027.84, leaving due the defendant $3327.33. That the Nightingale Mfg. Co. gave the defendant ten notes aggregating $3327.33, which notes were not accepted by the defendant as payment but only as evidence of and security for the balance due; that only the first two of said notes aggregating $620.47 were paid; that after the shipment of February 4, 1920, the credit of the Nightingale Mfg. Co. became so unsatisfactory that the defendant refused to deliver further cabinets except for cash; that the Nightingale Mfg. Co. agreed to that; that between January 6, 1920, and March 4, 1920, the defendant continually demanded that the Nightingale Mfg. Co. carry out its aforesaid order as modified; that on March 4, 1920, the defendant had on hand ready to deliver, and offered to deliver, 80 cabinets or any reasonable part thereof; that the Nightingale Mfg. Co. notified the defendant that it could not and would not accept said cabinets nor pay for them nor for any further cabinets; that the Nightingale Mfg. Co. was then virtually bankrupt and remained so; that no satisfactory specifications were ever given the defendant by the Nightingale Mfg. Co. for the second 1500 cabinets, so that the defendant could not even start the manufacture of them; that the Nightingale Mfg. Co. suffered a fire in September, 1919, which it stated resulted in great financial loss to it, and which it alleged was one of the causes for its inability to accept and pay for the cabinets theretofore manufactured; that on July 9, 1920, the Nightingale Mfg. Co. was duly adjudicated bankrupt; that the only payment the defendant has received on its claim is the sum of $320.17, for which it has given the plaintiff credit; that it has done everything

on its part to be performed with reference to the Nightingale Mfg. Co. order so modified as aforesaid, and was always ready, able and willing to perform and complete it but was prevented from doing so by the default of the Nightingale Mfg. Co.

Quite obviously, considering the contract between the defendant and the plaintiff, "that no commissions were to accrue or to be earned or to be due and payable""unless and until payment was made" and that said "commissions were to be only on such cabinets as were actually paid for by said customers in cash" and that "customers were to establish and maintain credit standing satisfactory to the defendant and that the defendant was to be under no obligations to manufacture or to continue to manufacture or to ship or deliver or continue to ship or deliver cabinets under any orders secured by plaintiff for said defendant from any of said customers if credit satisfactory to defendant was not established by such customer in any case or if the credit established was not maintained as aforesaid in a manner satisfactory to the defendant or if said customer in any case failed to pay for said cabinets in accordance with the terms of the contract made or to be made between the defendant and said customers," the plaintiff would not be entitled to any commissions on the Nightingale Mfg. Co. order save as set forth in the amended affidavit of merits.

It may be that if upon a trial it were proven that the contract between the plaintiff and the defendant were as alleged by the plaintiff in his statement of claim, the plaintiff would be entitled to recover commissions on 3000 cabinets. But that contract is denied and in its stead the defendant sets up such a contract that if the facts were proven on a trial as set forth in paragraph 5 of the amended affidavit of merits the plaintiff

on its part to be performed with reference to the Highlands Mfg. Co. order as modified as aforesaid, and was always ready, able and willing to perform and complete it but was prevented from doing so by the default of the Highlands Mfg. Co.

Quite obviously, considering the contract between the defendant and the plaintiff, "that no cancellations were to accrue or to be earned or to be due and payable" "unless and until payment was made" and that said "cancellations were to be only on such cabinets as were actually paid for by said customers in cash" and that "customers were to establish and maintain credit standing satisfactory to the defendant and that the defendant was to be under no obligations to manufacture or to continue to manufacture or to ship or deliver cabinets unless to ship or deliver cabinets under any orders secured by plaintiff for said defendant from any of said customers if credit satisfactory to defendant was not established by such customer in any case or if the credit established was not maintained as aforesaid in a manner satisfactory to the defendant or if said customer in any case failed to pay for said cabinets in accordance with the terms of the contract made or to be made between the defendant and said customers," the plaintiff could not be entitled to any commissions on the Highlands Mfg. Co. order save as set forth in the amended affidavit of merits.

It may be that if upon a trial it were proven that the contract between the plaintiff and the defendant were as alleged by the plaintiff in his statement of claim, the plaintiff would be entitled to recover commissions on 8000 cabinets. But that contract is denied and in its stead the defendant sets up such a contract that if the facts were proven on a trial as set forth in paragraph 3 of the amended affidavit of merits the plaintiff

would not be entitled to recover beyond what the defendant admits to be due. In other words the amended affidavit of merits properly puts in issue the claim of the plaintiff for a commission of $1500.00 for the orders which he obtained from the Nightingale Mfg. Co.

Counsel for the plaintiff refers to the allegation in the affidavit of merits, that the contract between the Nightingale Mfg. Co. and the defendant was modified and that the acceptance of the modification was made in writing on March 10, 1919, and argues that the written acceptance does not appear in the affidavit of merits, and that therefore there was no acceptance. It was not necessary for the pleader to set forth the written acceptance in detail in the affidavit of merits; that would have been not only superfluous but improper as it would only have lent to the prolixity of the pleading by reciting in detail the evidence. Of course, according to the defendant's statement of the contract with the plaintiff, which contains the words "if in any case said customer failed to pay for said cabinets in accordance with the terms of the contract made <u>or to be made</u> between the defendant and said customer," the defendant had the right to modify a contract with a customer without notifying the plaintiff and without subjecting itself to a liability for commissions if cabinets were not delivered thereunder and paid for.

It is also contended by counsel for the plaintiff that as the Nightingale Mfg. Co. paid cash for 203 cabinets it thereby established its credit, intimating that the defendant was not thereafter entitled to dispute the future credit of the Nightingale Mfg. Co., that, however, is not reasonable and upon a trial the defendant will be entitled to introduce, if it desires, evidence on that subject.

would not be entitled to recover beyond what the defendant admits to be due. In other words the amended affidavit of merits properly puts in issue the claim of the plaintiff for a commission of $1300.00 for the orders which he obtained from the Wightingale Mfg. Co.

Counsel for the plaintiff refers to the allegation in the affidavit of merits, that the contract between the Wightingale Mfg. Co. and the defendant was modified and that the acceptance of the modification was made in writing on March 10, 1919, and argues that the written acceptance does not appear in the affidavit of merits, and that therefore there was no acceptance. It was not necessary for the pleader to set forth the written acceptance in detail in the affidavit of merits; that would have been not only superfluous but improper as it would only have lent to the prolixity of the pleading by resulting in detail the evidence. Of course, according to the defendant's statement of the contract with the plaintiff, which contains the words "if in any case said customer failed to pay for said cabinets in accordance with the terms of the contract made or to be made between the defendant and said customer," the defendant had the right to modify a contract with a customer without notifying the plaintiff and without subjecting itself to a liability for commissions if cabinets were not delivered thereunder and paid for.

It is also contended by counsel for the plaintiff that as the Wightingale Mfg. Co. paid cash for 203 cabinets it thereby established its credit, intimating that the defendant was not thereafter entitled to dispute the future credit of the Wightingale Mfg. Co., that, however, is not reasonable and upon a trial the defendant will be entitled to introduce, if it desires, evidence on that subject.

Counsel for the plaintiff further argue that the receipt of notes for $3127.35 constituted payment as far as the rights of the plaintiff were concerned. That is untenable. Upon a trial the defendant would be entitled to undertake to show that they were received in such a way that they did not constitute payment.

Paragraph 6 recites that on March 1, 1919, the defendant received from the Great Eastern Manufacturing Company an order for the manufacture and delivery of 2500 small type phonograph cabinets at the rate of 50 per week, one half mahogany and one half oak, to be manufactured according to sample submitted, deliveries to be made F.O.B. Steger, Illinois, at the rate of 50 of each type per week; and 1000 large type cabinets, deliveries to be made at the rate of 50 or more per week; terms to be 2% ten days, thirty days net, cabinets to be made in accordance with sample design submitted, and deliveries to begin 40 days after acceptance of said order; that the order was accepted on March 27, 1919; that between June, 1919, and December, 1919, the defendant delivered, pursuant to the terms of the order, 457 cabinets which were accepted regardless of the defendants delay in delivering; that the Great Eastern Manufacturing Co. waived strict performance in regard to the time of delivery, and as to the remaining cabinets due under the order, and continued said order in full force and effect until February 12, 1920, on which date the Great Eastern Manufacturing Co. notified the defendant not to deliver any more cabinets under said order; that it would not accept or pay for the same; that so far as it was concerned said order was cancelled; and without any just or legal cause or excuse refused to accept or pay for any more of said cabinets, assigning as the only reason for said cancellation that it was overstocked with cabinets

Counsel for the plaintiff further argue that the receipt of money for $3187.50 constituted payment in fur as the rights of the plaintiff were concerned. That is untenable. Upon a trial the defendant would be entitled to undertake to show that they were received in such a way that they did not constitute payment.

Stipulation 6 recites that on March 1, 1919, the defendant received from the great Western Manufacturing Company an order for the manufacture and delivery of 4500 small type phonograph cabinets at the rate of 50 per week, one half machinery and one half oak, to be manufactured according to sample submitted, delivered to the same F.O.B. Bingen, Illinois, at the rate of 50 of each type per week; and 1000 large type cabinets, delivered to be made at the rate of 50 or more per week; terms to be 2% ten days, thirty days net, cabinets to be made in accordance with sample design submitted, and delivered to begin 60 days after receipt of said order; that the order was accepted on Jan. 27, 1919; that between June, 1919, and December, 1919, the defendant delivered, pursuant to the terms of the order, 627 cabinets which were accepted regardless of the defendants delay in delivering; that the great Western Manufacturing Co. waived strict performance in regard to the time of delivery, and up to the receiving cabinets had under the order, and continued said order in full force and effect until February 16, 1920, on which date the Great Western Manufacturing Co. notified the defendant not to deliver any more cabinets under said order; that it will not accept or pay for the same; that so far as it was concerned said order was cancelled; and without any just or legal cause or excuse refused to accept or pay for any more of said cabinets, assigning as the only reason for such cancellation that it was overstocked with cabinets

and was having difficulty of disposing of them; that the defendant on that date and during the entire continuance of the contract had performed all the things on its part to be performed and was ready, able and willing and offered to complete the delivery of all cabinets remaining due under said order and had cabinets on hand complying with the contract which it was ready and willing to, and offered to deliver to said company but was prevented from performing by the refusal of that company to perform and by its breach as aforesaid, and not by any fault of the defendant; that the said company paid for 455 cabinets which were delivered and the commissions due on those payments have been credited to the plaintiff.

There are three other items inthe statement of claim, one being that of the Cumming-Foster Corporation, another the Playerphone Talking Machine Co., and another that of Mack M. Bernstine. As to the first two of those items, the affidavit of merits shows that the purchasers failed to pay for cabinets which they had received, which, of itself, would prevent the plaintiff from recovering a commission providing the contract as to commissions was that set up inthe affidavit of merits. As to the Bernstine item; after the order was placed Bernstine, according to the affidavit of merits desired to substitute a certain corporation in lieu of himself but as Bernstine failed to obtain a proper guarantee no arrangement on that basis was made. Further, Bernstine refused, without just cause or excuse, to accept the cabinets which the defendant had already manufactured. His refusal was not because they were not made within the time specified in the original order, as Bernstine, notwithstanding the delays "had requested defendant to continue the said contract and did not insist on strict compliance with

and was having difficulty of disposing of them; that the defendant on that date and during the entire continuance of the contract had performed all the things on its part to be performed and was ready, able and willing and offered to complete the delivery of all cabinets remaining due under said order and had cabinets on hand complying with the contract which it was ready and willing to, and offered to deliver to said company but was prevented from performing by the refusal of that company to perform and by its breach as aforesaid, and not by any fault of the defendant; that the said company paid for 650 cabinets which were delivered and the commissions due on those payments have been credited to the liability.

There are three other items in the statement of claim, one being that of the Vending-Master Corporation, another the Playerphone Vending Machine Co., and another that of Mark H. Bernstine. As to the first two of these items, the affidavit of merits shows that the warehouse fail a to pay for cabinets which they had received, which, of itself, would prevent the plaintiff from recovering a commission providing the contract on in connection was that set up in the affidavit of merits. As to the Bernstine item; after the order was placed Bernstine, according to the affidavit of merits desired to substitute a certain convolution in lieu of Kissell; but as Bernstine failed to obtain a proper guarantee on arrangement on that basis was made. Further, Bernstine returned, without just cause or excuse, to accept the cabinets which the defendant had already manufactured. His refusal was not because they were not made within the time specified in the original order, as Bernstine, notwithstanding the delays "had requested defendant to continue the said contract and did not insist on strict compliance with

the terms of said contract with respect to deliveries", and the affidavit of merits also alleges that the defendant was not in default at the time of Bernstine's breach of contract.

Assuming the contract to be as alleged by the affidavit of merits, and that no material default occurred on the part of the defendant, but that the customers either failed to pay what was due or to furnish proper evidence of satisfactory credit, it follows inevitably that a good defense has been pleaded, such a defense as, if proven, would defeat the plaintiff's claim.

The fact that the defendant alleges that in some instances cabinets were not manufactured and delivered according to the technical chronology of the original orders makes no difference because in each instance it is alleged that the customers did not refuse to pay or to give credit on that ground but condoned that and gave other reasons for their refusal.

The rules of the Municipal Court provide (Rule 15n.) that "The denial of any material allegation shall constitute an issue; no other joinder of issue is necessary." and further, (Rule 15.b.) "Every pleading shall contain a concise statement of the ultimate facts on which the parties pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved."

In the instant case, the affidavit of merits sets forth a contract with the plaintiff different from that set forth by the plaintiff in his statement of claim, and the affidavit of merits, also, sets forth a history of its conduct with the various customers, which, if true, as alleged, proves that it does not now owe the plaintiff any further commissions than

the terms of said contract with respect to deliveries", and the affidavit of merits also alleges that the defendant was not in default at the time of Bernstein's breach of contract.

Assuming the contract to be as alleged by the affidavit of merits, and that no material default occurred on the part of the defendant, but that the customers either failed to pay what was due or to furnish proper evidence of satisfactory credit, it follows inevitably that a good defense has been pleaded, such a defense as, if proven, would defeat the plaintiff's claim.

The fact that the defendant alleges that in some instances cabinets were not manufactured and delivering according to the technical chronology of the original orders makes no difference because in such instance it is alleged that the customers did not refuse to pay or to give credit on that ground but contended that are gave other reasons for their refusal.

The rules of the Municipal Court provide (Rule 12a.) that "The denial of any material allegation shall constitute an issue; no other joinder of issue is necessary." and further, (Rule 12.b.) "Every pleading shall contain a concise statement of the ultimate facts on which the pleader is pleading rather than his claim or defense, as the case may be, but not the evidence by which they are to be proved."

In the instant case, the affidavit of merits sets forth a contract with the plaintiff different from that set forth by the plaintiff in its statement of claim, and the affidavit of merits, also, sets forth a history of its conduct with the various customers, which, if true, as alleged, proves that it does not owe the plaintiff any further commissions. When

these admitted to be due.

After carefully considering the statement of claim and the third amended affidavit of merits, we are quite clearly convinced that the latter precipitated an issue of fact and sufficiently set up a defense, and, under the circumstances, that it would work an injustice to deny the defendant the right to introduce evidence in an endeavor to make out its case as alleged. And, further, even if it were not so clear and was a matter of some doubt, it would only be fair and reasonable even then that the defendant should be given the opportunity of a trial upon the merits.

As a matter of wisdom, it is far better and safer to err in favor of allowing an adjudication upon evidence than to err in giving judgment passed solely on merely formal and admittedly controversial pleadings.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND CONNOR, J. CONCUR.

these admitted to be due.

After carefully considering the statement of claim and the third amended affidavit of merits, we are quite clearly convinced that the latter presupposed an issue of fact and sufficiently set up a defence, and, under the circumstances, that it would work an injustice to deny the defendant the right to introduce evidence in an endeavour to make out its case as alleged. And, further, even if it were not so clear and was a matter of some doubt, it would only be fair and reasonable even then that the defendant should be given the opportunity of a trial upon the merits.

As a matter of wisdom, it is far better and safer to err in favor of allowing an adjudication upon evidence than to err in giving judgment based solely on merely formal and admittedly controversial pleadings.

The judgment will be reversed and the cause remanded for a new trial.

NEW TRIAL AND REMANDED.

TWEEDY, P.J. AND CONNOR, J. CONCUR.

2732a

236 - 27244

JOHN NEENAN,

Appellant,

v.

CALUMET AND SOUTH CHICAGO RAILWAY CO., et al doing business as CHICAGO SURFACE LINES,

Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 612

Opinion filed Nov. 29, 1922.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 18, 1917, the plaintiff brought suit against the defendants for damages for personal injuries. There was a trial before a jury and at the close of the plaintiff's case, and, upon an instruction given by the trial judge to the jury to find the defendants not guilty, a verdict was given and a judgment entered in favor of the defendants. This appeal is therefrom.

The plaintiff's statement of claim sets forth that the plaintiff's claim is for damages in the sum of $1,000.00 as the result of injuries sustained by him on or about October 2, 1916, by reason of the negligence of the defendant; that on Cottage Grove avenue between 92nd and 93rd streets in the City of Chicago the defendants so negligently operated one of their street cars that, while it was running at a terrific rate of speed and violating a city ordinance, it collided with a horse and wagon which were being carefully driven by the plaintiff, and injured him.

The defendants filed an affidavit of merits which

[illegible] - 27144

JOHN KEENAN,

Appellant,

v.

[illegible]

Appellees.

Opinion filed Nov. 29, 1922.

Mr. Justice [illegible] delivered the opinion of the court.

[illegible]

denied the negligence charged in the plaintiff's statement of claim and alleged that the collision and damages, if any, were caused solely by the negligent manner in which the horse and wagon were managed and driven at the time and place in question.

At the trial, which was before a jury, only three witnesses were called; the plaintiff, John Neenan, Arthur Bohr, a passenger on the street car in question and one Dr. Barrett, a physician and surgeon who attended the plaintiff immediately after he was injured.

The evidence of the plaintiff, in, substantially, to the following effect; that on October 2, 1916, he was driving a box-wagon, which was 14 by 16 feet in length, with a team of horses delivering goods from place to place in the City of Chicago for the Hastings Express Company; that between two and three P.M. his wagon and horses were standing in front of a store about 200 to 300 feet north of 93rd street on the west side of Cottage Grove avenue; that he delivered to that store a stove, and then had occasion to go right across the street for another delivery; that he walked around the front of his team, which was facing north and was against the west curb of the street; that he walked in front of his horses to get up on the wagon; that at that time he saw the street car standing at 93rd street; that he proceeded to get up on his wagon; that from the time he took up the reins he did not turn or hear any bell or gong sounded; that he started across the street; that the next he remembered he was home, in bed, practically unable to move.

On cross examination he stated that he delivered packages and freight for the Hastings Express Company; that on

denied the negligence charged in the plaintiff's statement of claim and claimed that the collision and damage, if any, were caused solely by the negligent manner in which the horse and wagon were managed and driven at the time and place in question.

At the trial, which was before a jury, only three witnesses were called; the plaintiff, John Keenan, Arthur Bahr, a passenger on the street car in question and one Dr. Barrett, a physician and surgeon who attended the plaintiff immediately after he was injured.

The evidence of the plaintiff, in substantially, to the following effect; that on October 2, 1918, he was driving a box-wagon, which was 14 by 28 feet in length, with a team of horses delivering goods from place to place in the city of Chicago for the Wells Express Company; that between two and three P.M. his wagon and horses were standing in front of a store about 300 to 400 feet north of 92nd street on the west side of Cottage Grove avenue; that he delivered to that store a stove, and then had occasion to go right across the street for another delivery; that he walked around the front of his team, which was facing north and was against the west curb of the street; that he walked in front of his horses to get up on the wagon; that at that time he saw the street car standing at 92nd street; that he proceeded to mount on his wagon; that from the time he took up the reins he did not turn or look out but or look around; that he started across the street; that the next he remembered he was down, in bed, practically unable to move.

On cross examination he stated that he delivered packages and freight for the Wells Express Company; that on

the day in question he had been driving the wagon since nine o'clock in the morning; that when he came out of the store he walked around the horses heads over on the other side of the wagon; that he usually boarded it on the left side; that he went around on the right side because of "a habit of getting on the way the wagon stands"; that he went around the horses heads because of a habit he had of seeing whether the lines were unsnapped; that he looked south and saw the street car at 93rd street; that when he made the delivery he was between 92nd place and 93rd street; that it was about 200 or 300 feet from 92nd place and about 100 feet from 93rd street; that when he went around the horses heads he did nothing to the bridle or lines but went along and got up on the wagon; that he then saw the street car headed north; that he, himself, was going to drive his horses and wagon right across the street after he started up from the west side of Cottage Grove avenue; that while he was walking around the horses heads, which took him one or two minutes, the street car remained standing on the south side of 93rd street; that when he climbed up on the seat of the wagon the car was still standing to the south about 100 feet away; that he gathered up the lines and drove right straight across the car tracks; that he had a turn-table wagon and had no difficulty in turning the horses around; that he was looking east after he got started; that the street car was still stopped; that the horses started east and he remembers when the horses went on the southbound track that then he could not see where the street car was at that time; that the last time he looked was when he got up on the wagon; that at the time the horses were going across the street they were going slowly; that he did not urge them with a whip; that they were going "not off a walk"; that he could have stopped them inside

the day in question he had been driving the wagon since nine o'clock in the morning; that when he came out of the store he walked around the horses head over on the other side of the wagon; that he usually boarded it on the left side; that he went around on the right side because of a habit of getting on the way the wagon stands"; that he went around the horses head because of a habit he has of seeing whether the lines were unhooked; that he looked south and saw the street car at 92nd street; that when he made the delivery he was between 92nd place and 93rd street; that it was about 300 or 400 feet from 92nd place and about 150 feet from 93rd street; that when he went around the horses heads he did nothing to the bridle or lines but went along and got up on the wagon; that he then saw the street car headed north; that he, himself, was going to drive his horses and wagon right across the street after he started up from the west side of College Grove Avenue; that while he was walking around the horses heads, which took him one or two minutes, the street car remained standing on the south side of 92nd street; that when he climbed up on the seat of the wagon the car was still standing to the south about 100 feet away; that he gathered up the lines and drove right straight across the car tracks; that he had a two-table wagon and had no difficulty in turning the horses around; that he was looking east after he got started; that the street car was still stopped; that the horses started east in the roadway when the horses went on the southbound track that then he could not see where the street car was at that time; that the last time he looked was when he got up on the wagon; that at the time the horses were going across the street they were going slowly; that he did not urge them along; that they were going "not all a walk"; that he could have stopped the horses

of ten feet; that he did not know what hit him.

On redirect examination the plaintiff stated that he could have gotten up on either side of wagon; that the point of next delivery was north about two or three doors; that he crossed the street on a zig-zag; "In turning I just swung the horses straight and shot plump across the street."

The evidence of the witness Arthur Bohr, is to the effect that on October 2, 1916, he was a passenger on the car in question; that the car stopped on the south side of 93rd street; that when it was crossing 93rd street the motorman opened the side door, or front door, of the car and looked behind him. The language of the witness is as follows: "What he was looking at I don't know, but he kept looking out of the car and I was right alongside of him and as we drew near the wagon, I did not see the wagon until we were about ten feet from the wagon, and the motorman was still looking out the side of the car, and he glanced around * * * and made a grab for the controller." When asked further what happened, the witness testified; "The motorman turned around and made a grab for his controller and before he could stop the car he had dragged the wagon about ten or fifteen feet." The witness further testified that at the time the wagon was struck the horses were on the east side of the car track and the wagon pointing to the northeast; that the plaintiff, the driver of the wagon, was knocked off the seat and in some way under the street car so that the latter had to be backed up; that the plaintiff was then taken into a real estate office; that the car at the time of the collision and from the time it crossed 93rd street was going between 15 and 20 miles an hour; that no gong nor bell was sounded. On cross-examination he testified that he did not

of ten feet; that he did not know what hit him.

On redirect examination the plaintiff stated that he could have gotten up on either side of wagon; that the point of next delivery was north about two or three doors; that he crossed the street on a zig-zag; "I'm turning I just swung the horses straight and what plump across the street."

The evidence of the witness Arthur Bebr, is to the effect that on October 2, 1916, he was a passenger on the car in question; that the car stopped on the south side of 92nd street; that when it was crossing 92nd street the motorman opened the side door, or front door, as the car had looked behind him. The language of the witness is as follows: "that he was looking as I don't know, but he kept looking out of the car and I saw right alongside of him and as we drew near the wagon, I did not see the wagon until we were about ten feet from the wagon, and the motorman was still looking out the side of the car, and he jammed around * * * and made a grab for the controller." Then asked further what happened, the witness testified; "The motorman turned around and made a grab for his controller and before he could stop the car he had dragged the wagon about ten or fifteen feet." The witness further testified that at the time the wagon was struck the horses were on the west side of the car track and the wagon pointing to the northwest; that the plaintiff, the driver of the wagon, was knocked off the seat and in some way under the street car so that the latter had to be backed up; that the plaintiff was then taken into a real estate office; that the car at the time of the collision and from the time it crossed 92nd street was going between 15 and 20 miles an hour; that no gong nor bell was sounded. On cross-examination he testified that he did not

see any traffic other than the street car and the wagon on Cottage Grove avenue at the time; that the street car was a care length on the north side of the crossing when the motorman opened the door and put his head out; that he continued to look back until the car was within ten or fifteen feet of the wagon; that he, himself, was watching the motorman from the time he opened the door and so did not know where the street car was at the time the horses went onto the track; that the street car struck the front of the wagon and came to a stop within fifteen feet afterwards.

The evidence of the physician and surgeon, Dr. Barrett, was to the effect that he attended the plaintiff shortly after he was injured; that he found him suffering from injuries to the right arm, both legs and both hips; that there was a contusion on the right shoulder and a wound about two inches long between the buttocks; that he dressed the arm, cleaned up the contusions on the legs and put on wet dressings and bandages; that he continued to visit him for about five weeks thereafter.

At the close of the plaintiff's evidence counsel for the defendants offered and asked the court to give the following instruction; "The court instructs the jury to find the defendants and each of them not guilty." Counsel for the plaintiff objected to the instruction but the objection was overruled and the instruction given and a verdict returned in accordance with the instruction and subsequently judgment was entered upon the verdict in favor of the defendants and against the plaintiff.

It is now claimed on behalf of the plaintiff that the trial judge erred and that the evidence ought to have been sub-

see any traffic other than the street car and the wagon on Cottage Grove avenue at the time; that the street car was a car length on the north side of the crossing when the motorman opened the door and put his head out; that he continued to look back until the car was within ten or fifteen feet of the wagon; that he, himself, was watching the motorman from the time he opened the door and he did not know where the street car was at the time the horses went onto the track; that the street car struck the front of the wagon and came to a stop within fifteen feet afterwards.

The evidence of the physician and surgeon, Dr. Barrett, was to the effect that he attended the plaintiff shortly after he was injured; that he found his suffering from injuries to the right arm, both legs and both hips; that there was a contusion on the right shoulder and a wound about two inches long between the buttocks; that he dressed the arm, cleaned up the contusions on the legs and put on wet dressings and bandages; that he continued to visit him for about five weeks thereafter.

At the close of the plaintiff's evidence counsel for the defendants officers requested the court to give the following instruction; "The court instructs the jury to find the defendants and each of them not guilty." Counsel for the plaintiff objected to the instruction but the objection was overruled and the instruction given and a verdict returned in accordance with the instruction and subsequently judgment was entered upon the verdict in favor of the defendants and against the plaintiff.

It is now claimed in behalf of the plaintiff that the trial judge erred and that the evidence ought to have been sub-

mitted to the jury. On the other hand it is contended on behalf of the defendants that the court was justified in directing a verdict in their favor on the ground that there was no evidence submitted by the plaintiff which would reasonably authorize the jury to find the defendants guilty of the negligence charged.

The question arises whether, having in mind the testimony of the plaintiff and the witness Bohr, there was sufficient evidence of negligence to justify its submission to the jury for their determination. There is no doubt but that there are some ambiguities in the testimony of the plaintiff and, yet, taking his testimony all together and in conjunction with that of Bohr, it cannot be said, as a matter of law, to show a failure of ordinary care on the part of the plaintiff nor can it be said to fail to show negligence on the part of the defendants. The plaintiff had a perfect right to get up on his wagon and then turn and drive across Cottage Grove avenue, as he says he did, if at that time he saw the street car standing at 93rd street some 200 to 300 feet south of where his wagon was.

On cross-examination he said that when he walked around the horses heads preparatory to getting up on the wagon the street car remained standing on the south side of 93rd street; he also says that when he climbed up onto the seat of the wagon the street car was still standing to the south about 100 feet away. There is a slight discrepancy between that statement and the statement he made on direct examination. The evidence of the witness Bohr corroborates the testimony of the plaintiff that the street car stopped on the south side

mitted to the jury. On the other hand it is contended on behalf of the defendants that the court was justified in directing a verdict in their favor on the ground that there was no evidence submitted by the plaintiff which would reasonably authorize the jury to find the defendants guilty of the negligence charged.

The question arises whether, having in mind the testimony of the plaintiff and the witness Kohr, there was sufficient evidence of negligence to justify its submission to the jury for their determination. There is no doubt but that there are some ambiguities in the testimony of the plaintiff and, yet, taking his testimony [illegible] together and in conjunction with that of Kohr, it cannot be said, as a matter of law, so more a failure of ordinary care on the part of the plaintiff nor can it be said to fail to show negligence on the part of the defendants. The plaintiff had a perfect right to get up on his wagon and view lane and drive across Lehigh Street avenue, as he may be did, if at that time he saw the street car standing at 22nd street [illegible] to the left south of where his wagon was.

On cross-examination he said that when he noticed around the corner [illegible] preparatory to getting on the wagon the street car [illegible] standing on the south side of 22nd street; he also says that when he climbed on [illegible] the seat of the wagon the street car was still standing [illegible] 100 feet away. There is a slight discrepancy between that statement and the statement he made on direct examination.

The evidence of two witness Kohr corroborates the testimony of the plaintiff that the street car stopped on the south side

of 93rd street. Bohr adds the fact, however, that when the street car was crossing 93rd street the motorman opened the side door, or front door, of the car and looked behind him. Bohr's testimony is in these words, "What he was looking at I don't know but he kept looking out of the car and I was right alongside of him and as we drew near the wagon, I did not see the wagon until we were about ten feet from the wagon, and the motorman was still looking out the side of the car and he glanced around * * * and made a grab for the controller * * * and before he could stop the car he had dragged the wagon about ten or fifteen feet." Bohr also testified that at the time the wagon was struck the horses were on the east side of the car track and the wagon pointed to the northeast and that the driver had been knocked off the seat.

Considering all the evidence we are not able to conclude that it leads to but one conclusion, that is negligence on the part ofthe plaintiff. We are of the opinion that whether under the circumstances the plaintiff was in the exercise of ordinary care when driving across the street as he did, was a matter which should have been determined by the jury and not by the trial judge. Chicago Union Traction Company v. Jacobson, 217 Ill. 404; Chambers v. Chicago City Railway Company, 189 Ill. App. 62; Louthan v. Chicago City Railway Company, 198 Ill. App. 329.

In the Louthan case this court said, "As a general proposition a question of contributory negligence is one of fact for the jury and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not ar-

of 52nd street. Both made the fact, however, that when the street car was crossing 52nd street the motorman opened the side door, or front door, of the car and looked behind him. Both's testimony is in these words, "What he was looking at I don't know but he kept looking out of the car and I was right alongside of him and so we knew near the wagon, I did not see the wagon until we were about ten feet from the wagon, and the motorman was still looking out the side of the car and he glanced around * * * and made a grab for the controller * * * and before he could stop the car he had struck the wagon about ten or fifteen feet." Both also testified that at the time the wagon was struck the horses were on the west side of the car track and the wagon, further in the roadway and that the driver had been knocked off the seat.

Considering all the evidence we are not able to conclude that it leads to but one conclusion, that is negligence on the part of the plaintiff. We are of the opinion that whether under the circumstances the plaintiff was in the exercise of ordinary care when driving across the street as he did, was a matter which should have been determined by the jury and not by the trial judge. Illinois Union Traction Company v. Jackson, 217 Ill. 464; Chambers v. Chicago City Railway Company, 189 Ill. App. 63; Lawlor v. Chicago City Railway Company, 198 Ill. App. 320.

In the Lawlor case this court said, "As a general proposition a question of contributory negligence is one of fact for the jury and only becomes one of law when the evidence clearly establishes that the accident resulted from the negligence of the injured party. If there be any difference of opinion on the question, so that reasonable minds may not ar-

rive at the same conclusion then it is a question of fact for the jury."

As to the negligence of the defendant; the testimony of Bohr, standing alone as it does, suggests, quite strongly, negligence on the part of the motorman. The result is, therefore, that there was substantial evidence on the part of the plaintiff that, at the time, he was in the exercise of care, and, also, some substantial evidence that the motorman, at the time, was not in the exercise of care. Such being the record we are of the opinion thatthe trial judge erred when he instructed the jury to bring in a verdict for the defendants.

It is further contended on the part of the defendants that all the parties to this action were within the purview, and governed by the provisions of the Workmen's Compensation Act; that the evidence shows that the plaintiff's employer and the defendants, by reason of the nature of their business, were subject to the provisions of the Workmen's Compensation Act, and that, therefore, the plaintiff being injured by the defendants while at work at his regular employment is not entitled to recover in this action. That claim is untenable. Neither the averments of the statement of claim nor the proof, both taken together, show that the provisions of the Workmen's Compensation Act apply. Whether or not the plaintiff's employer was a common carrier is not shown. Mere proof of a name such as that of an express company and that the plaintiff for his employer delivered goods at different places is not sufficient.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

rive at the same conclusion then it is a question of fact for the jury."

As to the negligence of the defendant; the testimony of Dobr, standing alone as it does, suggests, quite strongly, negligence on the part of the motorman. The result is, therefore, that there was substantial evidence on the part of the plaintiff that, at the time, he was in the exercise of care, and, also, some substantial evidence that the motorman, at the time, was not in the exercise of care. Such being the record we are of the opinion that the trial judge erred when he instructed the jury to bring in a verdict for the defendants.

It is further contended on the part of the defendants that all the parties to this action were within the purview, and governed by the provisions of the Workmen's Compensation Act; that the evidence shows that the plaintiff's employer and the defendants, by reason of the nature of their business, were subject to the provisions of the Workmen's Compensation Act, and that, therefore, the plaintiff being injured by the defendants while at work at his regular employment is not entitled to recover in this action. That claim is untenable. Neither the averments of the statement of claim nor the proof, both taken together, show that the provisions of the Workmen's Compensation Act apply. Whether or not the plaintiff's employer was a common carrier is not shown. Here proof of a make such as that of an express company and that the plaintiff for his employer delivered goods at different places is not sufficient.

The judgment will be reversed and the cause remanded for a new trial.

BEFORE THE ARB. CONSIDERED.

TREXLER, P.J. AND O'CONNOR, J. DISSENT.

388 - 27346

PEOPLE OF THE STATE OF ILLINOIS,
ex rel KATHERINE GRIFFITH,

Appellee,

v.

EDWARD KELLY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On December 30, 1920, Katherine Griffith, having first obtained leave of court, filed her complaint in the Municipal Court of Chicago, setting up that on March 12, 1920, she was delivered of a female child which child by law would be deemed a bastard and that at the time she was so delivered of said child she was, and still is, an unmarried woman, and that Edward Kelly is the father of the child.

The defendant, Edward Kelly, was served with a warrant and appeared in court and filed a plea of not guilty. There was a trial by the court, a jury having been waived, and a judgment finding that the defendant was the father of the bastard child and ordering that he pay to the clerk of the court for the support, maintenance and education of said child, $1100.00 as follows:- $200.00 for the first year, payable instanter, and $100.00 yearly for nine years thereafter, and that he give bond of $2200.00 to secure those payments, and in default of bond be committed to jail, there to remain until he complied with the judgment order. This appeal is from that judgment.

The prosecutrix, Katherine Griffith, testified that

388 - 27243

PEOPLE OF THE STATE OF ILLINOIS,
ex rel KATHERINE GRIFFITH,

Appellee,

v.

EDWARD KELLY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

Opinion filed Nov. 29, 1922.

PRESENT AND OPINION.

MR. JUSTICE FRECH delivered the opinion of the court.

On December 30, 1920, Katherine Griffith, having first obtained leave of court, filed her complaint in the municipal Court of Chicago, setting up that on March 12, 1920, she was delivered of a female child which child by law would be deemed a bastard and that at the time she was so delivered of said child she was, and still is, an unmarried woman, and that Edward Kelly is the father of the child.

The defendant, Edward Kelly, was served with a warrant and appeared in court and filed a plea of not guilty. There was a trial by the court, a jury having been waived, and a judgment finding that the defendant was the father of the bastard child and ordering that he pay to the clerk of the court for the support, maintenance and education of said child, $100.00 as follows:- $50.00 for the first year, payable immediately, and $10.00 yearly for nine years thereafter, and that he give bond of $500.00 to secure those payments, and in default of bond be committed to jail, there to remain until he complied with the judgment order. This appeal is from that judgment.

The prosecutrix, Katherine Griffith, testified that

she was never married; that she gave birth to a female child on March 12, 1920; that Edward Kelly, the defendant, is the father of the child; that she had intercourse with him "about the middle part of June", on one occasion and only one, and never at any other time had intercourse with anyone; that it took place "down to my home, one time in my aunt's gangway"; that he ran after her until her baby came and then he stopped; that she did not say anything to him until the baby was seven months old "because he didn't seem to care anything about it at all"; that she didn't want it to get to his mother; that she had once been in the Juvenile Court for about two months; that that was because of her relations with Edward Kelly.

The defendant, Edward Kelly, denied ever having sexual intercourse with the prosecutrix. A witness, Bertha Cleveland, testified that from about three weeks after the baby was born on March 12, 1920, until October 27, 1920, she took care of the baby; that three or four weeks after the baby was born she had a talk with the prosecutrix and the latter said that the baby's father was a Mexican who belonged in Michigan. In answer to the question whether she had any further talk with the prosecutrix about the child the witness answered, "All I had was about the baby's father when she was going to Michigan to marry him." She further testified that the prosecutrix did go to Michigan.

The witness, Hattie Dupont, testified that she knew the prosecutrix and that on March 12, 1920, she had a talk with her and asked her if she was married and that the prosecutrix said she was not; that she then asked her who was the baby's father and she said a Mexican; that sometime in August, 1919, the prosecutrix told her that she was going to Michigan and that when asked what was she going to Michigan for, the prose-

she was never married; that she gave birth to a female child on March 12, 1930; that Edward Kelly, the defendant, is the father of the child; that she had intercourse with him "about the middle part of June", on one occasion and only one, and never at any other time had intercourse with anyone; that it took place "down to my home, one time in my aunt's runway"; that he ran after her until her baby came and then he stopped; that she did not say anything to him until the baby was seven months old "because he didn't seem to care anything about it at all"; that she didn't want it to get to his mother; that she had once been in the Juvenile Court for about two months; that that was because of her relations with Edward Kelly.

The defendant, Edward Kelly, denied ever having sexual intercourse with the prosecutrix. A witness, Bertha Cleveland, testified that from about three weeks after the baby was born on March 12, 1930, until October 27, 1930, she took care of the baby; that three or four weeks after the baby was born she had a talk with the prosecutrix and the latter said that the baby's father was a Mexican who belonged in Michigan. In answer to the question whether she had any further talk with the prosecutrix about the child the witness answered, "All I had was about the baby's father when she was going to Michigan to marry him." The further testified that the prosecutrix did go to Michigan.

The witness, Nettie Wyant, testified that she knew the prosecutrix and that on March 12, 1930, she had a talk with her and asked her if she was married and that the prosecutrix said she was not; that she then asked her who was the baby's father and she said a Mexican; that sometime in August, 1929, the prosecutrix told her that she was going to Michigan and that when asked what was she going to Michigan for, the prose-

cutrix said "she was going there to get married to this Mexican."; that she subsequently did go to Michigan.

After the testimony of the defendant and Bertha Cleveland and Hattie Dupont was put in, the prosecutrix was recalled and testified, "Now this lady that kept my baby I told her that Edward Kelly was the father of the baby and she knows it, she is not telling the truth. I told her he was the father of it and it was only for the money my baby must have now." When asked by the Court if she ever said to anybody that Kelly was not the father of her child she answered, "That is not the truth. I always said he was the father and he is." And when asked by the Court about the Mexican, who was mentioned, she said, "It is not the truth. They are not telling the truth, they are all against me."

At the close of the testimony when the question as to whether the child showed that it had Mexican blood in it had been discussed, the court said, "In this case I will say very frankly, after taking into consideration the evidence both for the complaining witness and that of the defendant and his witness, that the testimony of the complainant witness carries a stronger conviction in the mind of the court than does the testimony of the defendant. Now if you are prepared to call in some expert doctor as to whether or not this child has Mexican blood in it I will hear that." Counsel for the defendant then stated that they were not urging that, and thereupon the court found against the defendant. From the statement of counsel it appears, though it is not definitely stated, that the prosecutrix and defendant are both colored.

It is the contention of counsel for the defendant

Beatrix said "she was going there to get married to this Mexican."; that she subsequently did go to Honduras.

After the testimony of the defendant and Bertha Cleveland and Hattie Bryant was put in, the prosecutrix was recalled and testified, "Now this lady that kept my baby I told her that Edward Kelly was the father of the baby and she knows it, she is not telling the truth. I told her he was the father of it and it was only for the money my baby must have now." When asked by the Court if she ever said to anybody that Kelly was not the father of her child she answered, "That is not the truth. I always said he was the father and he is." And when asked by the Court about the Mexican, who was mentioned, she said, "It is not the truth. They are not telling the truth. They are all against me."

At the close of the testimony upon the question as to whether the child showed that it was Mexican blood in it had been discussed, the court said, "In this case I will say very frankly, after taking into consideration the evidence both for the complaining witness and that of the defendant and the witnesses, that the testimony of the complainant witness carries a stronger convict on i, the mind of the court than does the testimony of the defendant. Now if you are prepared to call in some expert doctor as to whether or not this child has Mexican blood in it I will hear that." Counsel for the defendant then stated that they were not arguing that, but thereupon the court found against the defendant. From the statement of counsel it appears, though it is not definitely stated, that the prosecutrix and defendant are both colored.

It is the contention of counsel for the defendant

that the judgment is against the weight of the evidence and that the sworn complaint was that the alleged crime was committed after the date of filing the complaint, and even though it be a clerical error, it is fatal.

The truth of paternity is always difficult as it may be said generally that the only ones who may know the truth are the father and mother themselves. Here the prosecutrix affirms positively that the defendant is the father of her child. He denies it. As a matter of common sense courts and the people are generally inclined to give greater weight to the evidence of the mother, in such circumstances as these, than to the evidence of the putative father. The chief evidence of importance which is counter to her testimony is that of Bertha Cleveland and Hattie Dupont, both of whom say that the prosecutrix told them that the father of the child was a Mexican. The trial judge at the close of the trial said, "In this case I will say very frankly after taking into consideration the evidence both for the complaining witness and that of the defendant and his witnesses, that the testimony of the complainant witness carries a stronger conviction in the mind of the court than does the testimony of the defendant." We are necessarily, and should be, much impressed by the judgment of the trial judge in such a case. It is impossible for us, sitting as we do in a court of review, with merely the printed record before us, to consider what may have been given to the mind of the trial judge as a result of the appearance of the four persons who appeared as witnesses in the case. We know that it is the law that the mere fact of the number of witnesses does not of itself necessarily determine the question at issue. People, ex rel Hewes v. Michael, 189 Ill.App. 495. In the latter case, which involved a question of paternity, the court said, "While the number of witnesses is a factor that

that the judgment is against the weight of the evidence and that the sworn complaint was that the alleged crime was committed after the date of filing the complaint, and even though it be a clerical error, it is fatal.

The truth of paternity is always difficult as it may be said generally that the only ones who may know the truth are the father and mother themselves. Here the prosecutrix affirms positively that the defendant is the father of her child. No doubt it. As a matter of common sense courts and the people are generally inclined to give greater weight to the evidence of the mother, in such circumstances as these, than to the evidence of the putative father. The chief evidence of importance which is counter to her testimony is that of Gertha Cleveland and Hettie Bryant, both of whom say that the prosecutrix told them that the father of the child was a negroes. The trial judge at the close of the trial said, "In this case I will say very frankly after taking into consideration the evidence both for the complaining witness and that of the defendant and his witnesses, that the testimony of the complaining witness carries a stronger conviction in the mind of the court than does the testimony of the defendant." We are necessarily, and should be, much impressed by the judgment of the trial judge in such a case. It is impossible for us, sitting as we do in a court of review, with merely the printed record before us, to consider what may have been given to the mind of the trial judge as a result of the appearance of the four persons who appeared as witnesses in the case. We know that it is the law that the number of the number of witnesses does not of itself necessarily determine the question at issue. Ingle, ex rel Drake v. Bledsoe, 189 Ill.App. 595. In the latter case, which involved a question of paternity, the court said, "It is the number of witnesses [illegible] that

may be properly taken into consideration in determining where the weight of preponderance of the evidence lies, yet it is not determinative of that fact." It is claimed by counsel for the defendant that inasmuch as the prosecutrix testified that the first and only time she had intercourse with the defendant was "In June." "June 12 was the last time - the first and last time."; and as no year is mentioned, she must be considered as having referred to June, 1920, and as the complaint was sworn out in December, 1920, and the child was born in March, 1920, the defendant could not have been the father of the child. We think, however, it is the only fair, taking all the evidence together, to conclude that as the child was born March 12, 1920, the June referred to was June, 1919, especially as Hattie Dupont testified that she talked to the prosecutrix in August, 1919, before her baby was born. There is some claim that the evidence did not show where the defendant resided; that is, whether he was a resident of Chicago, but the bastardy warrant shows it was served upon him by arresting him and bringing his body into court on January 4, 1921, and in People v. Wunsch, 198 Ill. App. 437, a bastardy case, where the defendant sought to reverse a judgment on the ground of non-residence, the court held, that it would presume that the officer executing the warrant acted strictly within the scope of his authority and within his jurisdiction and, therefore, that the defendant was found within the City of Chicago when arrested.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

may be properly taken into consideration in determining where the weight of preponderance of the evidence lies, yet it is not determinative of that fact." It is claimed by counsel for the defendant that inasmuch as the prosecutrix testified that the first and only time she had intercourse with the defendant was "in June." "June 12 was the last time - the first and last time."; and as no year is mentioned, she must be considered as having referred to June, 1920, and as the complaint was sworn out in December, 1920, and the child was born in March, 1920, the defendant could not have been the father of the child. We think, however, it is the only fair, taking all the evidence together, to conclude that as the child was born March 12, 1920, the June referred to was June, 1919, especially as neither Dupont testified that she talked to the prosecutrix in August, 1919, before her baby was born. There is more claim that the evidence did not show where the defendant resided; that is, whether he was a resident of Chicago, but the bastardy warrant upon it was served upon him by arresting him and bringing his body into court on January 4, 1921, and in People v. Wanner, 198 Ill. App. 427, a bastardy case, where the defendant sought to reverse a judgment on the ground of non-residence, the court said, that it would presume that the officer executing the warrant acted strictly within the scope of his authority and within his jurisdiction and, therefore, that the defendant was found within the City of Chicago when arrested.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

THORNTON, P.J. AND CONNOR, J., CONCUR.

111 - 27585

JACOB A. LEWITZ,
Appellee,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

227 I.A. 612[3]

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Defendant issued to plaintiff two burglary insurance policies on merchandise in the latter's place of business in Chicago, one policy being dated May 23, 1919, the other November 20, 1919, and each being for the period of one year from its date. The burglary took place April 22, 1920. Defendant refusing to pay any part of the loss incurred, this suit was brought. The verdict was for $19,971.50.

Appellant complains of the overruling of its motion at the close of the evidence for an instructed verdict, and also its motion for a new trial after its rendition, and urges (1) that there was a breach of certain promissory warranties in the policies; (2) a misrepresentation in the warranty statements contained therein as to the amount of loss from a prior burglary; (3) that the evidence is insufficient to sustain the verdict; (4) that it is excessive; (5) that there was error in the admission of evidence, and (6) error in modifying instructions.

We shall take up these points in the order stated.

1. As to the alleged breach of warranties.

The policies provide that:

JACOB A. LEWITZ,

Appellee,

vs.

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Defendant issued to plaintiff two burglary insurance policies on merchandise in the latter's place of business in Chicago, one policy being dated May 23, 1919, the other November 20, 1919, and each covering for the period of one year from its date. The burglary took place April 2, 1920. Defendant refusing to pay any part of the loss incurred, this suit was brought. The verdict was for $10,271.80.

Appellant complains of the overruling of its motion at the close of the evidence for an instructed verdict, and also its motion for a new trial after its rendition, and urges (1) that there was a breach of certain promissory warranties in the policies; (2) a misrepresentation in the warranty statements contained therein as to the amount of loss from a prior burglary; (3) that the evidence is insufficient to sustain the verdict; (4) that it is excessive; (5) that there was error in the admission of evidence, and (6) error in modifying instructions.

We shall take up these points in the order stated.

I. As to the alleged breach of warranties.

The policies provide that:

"This policy shall not cover any loss or damage:
(d) Unless books and accounts are regularly kept by the assured, and the actual amount of loss or damage sustained can be accurately determined therefrom by the insurer."

The basis of appellant's argument on this point is that the books shall be so kept as to enable the insurer to determine accurately therefrom, and not approximately, the actual loss.

Shortly after the burglary took place appellant's investigator and adjuster went through appellee's books and accounts and made an inventory of the remaining stock and a computation of the loss, in which he was assisted by appellee's bookkeeper. Appellee had had a prior burglary. The first policy was taken out right after the same. In making such computation they started with an estimate of the value of goods on hand right after the first burglary, the inventory or appraised value not then being before them. The estimated value was $10,000. The appraised value was $11,000. They then examined the invoices of goods purchased between the dates of the two burglaries and found the same amounted to $29,831.38. Deducting from this the amount of the sales in the interval and the amount of yardage and value of goods on hand, the total loss was figured at $17,101.72, to which should be added $1,000 owing to the difference between the estimated and actual value of the goods on hand after the first burglary.

Appellant contends that from such data the loss could not be accurately determined, and hence appellee did not comply with the requirements of the policy respecting the keeping of books and accounts. We do not deem it necessary to make an extensive review of the character of such data. It consisted of the stock book, said invoices, the work tickets, price of garments sold, the name or character of the material, and the order book. While a strict computation required reference from

"This policy shall not cover any loss or damage:
(d) unless books and accounts are regularly kept by the assured, and the actual amount of loss or damage sustained can be accurately determined therefrom by the insurer."

The basis of appellant's argument on this point is that the books shall be kept so as to enable the insurer to determine accurately therefrom, and not approximately, the actual loss.

Shortly after the burglary took place appellant's investigator and adjuster went through appellee's books and accounts and made an inventory of the remaining stock and a computation of the loss, in which he was assisted by appellee's bookkeeper. Appellee had had a prior burglary. The first policy was taken out right after the case. In making such computation they started with an estimate of the value of goods on hand right after the first burglary, the inventory or appraised value not than being before them. The estimated value was $10,000. The appraised value was $11,000. They then examined the invoices of goods purchased between the date of the two burglaries and found the same amounted to $28,891.32. Deducting from this the amount of the sales in the interval and the amount of vendee and value of goods on hand, the total loss was figured at $17,191.32, to which should be added $1,000 which is the difference between the estimated and actual value of the goods on hand after the first burglary.

Appellant contends that from such data the loss could not be accurately determined, and hence appellee did not comply with the requirement of the policy requiring the keeping of books and accounts. We do not deem it necessary to make an exhaustive review of the character of such data. It consists of the stock book, said invoices, the work tickets, pages of garments sold, the date of delivery of the materials, and the order book. Only a strict compilation required reference to

one to another there seems to have been no difficulty on the part of the investigator or adjuster in determining the amount of the loss therefrom. While plaintiff's witnesses testified how the result was reached and produced many exhibits to verify such testimony we do not find from the evidence given by appellant's adjuster that he had any difficulty in ascertaining therefrom a reasonably accurate amount of the loss. We shall not undertake to examine the evidence on this subject in detail. While, to be sure, the books and accounts were not kept according to the most approved methods we think the data were such as to enable the insurer to determine therefrom with a reasonable degree of accuracy the amount of such loss, and it is somewhat significant that its investigator did not testify to the contrary, and that it did not refuse to pay the same until some four months after the investigator had figured up the loss from such data.

As to the value of the goods on hand after the first burglary the evidence tends to show that before the first policy was issued covering the same their value was figured by an expert and reported to the insurance broker who negotiated the insurance and that the policy was not issued until after an inspection by appellant's agent. The policy, therefore, must have been issued upon the basis of such appraised value and therefore appellant is hardly in a position to question the same.

It is urged that plaintiff's testimony as to the loss depended somewhat upon oral testimony as to items of value which did not appear in the sales book. But we think it sufficiently appears that they were disclosed to or could have been ascertained by appellee's investigator from the data aforesaid at the time of the investigation. The weight of

one to another there seems to have been no difficulty on the part of the investigator or adjuster in determining the amount of the loss therefrom. While plaintiff's witnesses testified how the result was reached and produced many exhibits to verify such testimony we do not find from the evidence given by appellant's adjuster that he had any difficulty in ascertaining therefrom a reasonably accurate amount of the loss. We shall not undertake to examine the evidence on this subject in detail. While, to be sure, the books and accounts were not kept according to the most approved methods we think the data were such as to enable the insurer to determine therefrom with a reasonable degree of accuracy the amount of such loss, and it is conceded that the insurer did not testify to the contrary, and that it did not refuse to pay the same until some four months after the investigator had figured up the loss from such data.

As to the value of the goods on hand after the first burglary the evidence tends to show that before the first policy was issued covering the same their value was figured by an expert and reported to the insurance broker who negotiated the insurance and that the policy was not issued until after an inspection by appellant's agent. The policy, therefore, must have been issued upon the basis of such appraised value and therefore appellant is hardly in a position to question the same.

It is urged that plaintiff's testimony as to the loss depended somewhat upon oral testimony as to items of value which did not appear in the sales book. But to think it sufficiently appears that they were disclosed to or could have been ascertained by appellant's investigator from the data aforesaid at the time of the investigation. The weight of

such testimony as to the amount of loss is quite a different question from whether it was capable of determination by the insurer from appellee's books and accounts. Whether it was so was a question of fact for the jury, with respect to which we are not disposed to disturb their verdict. It has been held that a reasonable compliance with the terms of the policy is sufficient. (Peoples Fire Insurance Co. v. Culver, 127 Ill. 249.) And as courts do not favor forfeitures of policies for purely technical violations there has been considerable uniformity in rulings on this question to the effect that the books are sufficiently kept if they will enable a man of average intelligence to ascertain with reasonable certainty the loss sustained. (Life Insurance Co. v. Friedman, 108 Miss. 790; Horwitz v. U. S. Fidelity & Guaranty Co., 95 Wash. 455; National Surety Co. v. Silverberg Bros., 176 S. W. Rep. 97; Liverpool, London & Globe Ins. Co. v. Kearney, 180 U. S. 132; Insurance Co. v. Ellington, 94 Ga. 785; Western Assurance Co. v. Reeding, 68 Fed. 708.)

The policy required that a burglar alarm system be always used. One was installed before the policies were taken out and was in useup to the time of the burglary but was put temporarily out of order about eight o'clock of that evening by some one on the outside smashing a window with which its operation was connected. Plaintiff directed an employe to call the burglary alarm concern to replace the alarm. The concern was not called until about nine o'clock or a little after when their place of business was closed. The burglary occurred later the same night. It is urged there was a breach of the policy requiring the system always to be used. An instruction on this subject, offered by appellant, to the effect that if plaintiff failed to show that the burglar alarm system was in working order and repaired at the time of the burglary he could not

such testimony as to the amount of loss is quite a different question from whether it was capable of determination by the insurer from appellee's books and accounts. Whether it was to was a question of fact for the jury, with respect to which we are not disposed to disturb their verdict. It has been held that a reasonable compliance with the terms of the policy is sufficient. (Peoples Fire Insurance Co. v. Oliver, 127 Ill. 249.) And as courts do not favor forfeitures of policies for purely technical violations there has been considerable authority in rulings on this question to the effect that the books are sufficiently kept if they will enable a man of average intelligence to ascertain with reasonable certainty the loss sustained. (Life Insurance Co. v. Fletcher, 108 Ill. 390; Norwich v. U. S. Fidelity & Guaranty Co., 68 Wash. 405; National Surety Co. v. Silverman Bros., 176 S. W. Rep. 97; Liverpool, London & Globe Ins. Co. v. Kearney, 180 U. S. 132; Insurance Co. v. Filley, 64 Ga. 789; Western Assurance Co. v. Boehing, 68 Ind. 308.)

The policy required that a burglar alarm system be always used. One was installed before the policies were taken out and was in working to the time of the burglary but was put temporarily out of order about eight o'clock of that evening by some one on the outside smashing a window with which its operation was connected. Plaintiff directed an employe to call the burglary alarm concern to replace the alarm. The concern was not called until about nine o'clock or a little after when their place of business was closed. The burglary occurred later the same night. It is urged there was a breach of the policy requiring the system always to be used. An instruction on this subject, offered by appellant, to the effect that if plaintiff failed to show that the burglar alarm system was in working order and repaired at the time of the burglary he could not

recover was modified by the court to read:

> "Unless you shall further find that said burglar alarm system was only temporarily out of repair, and that plaintiff used immediately all reasonable efforts to have repaired said burglar alarm system after it became out of repair."

It is urged by appellee that the provision that such a system would always be used is a mere representation and not a warranty. Whether it be regarded as one or the other the evidence is insufficient from which to impute negligence or fraud to the assured. If there was any negligence it was on the part of his employe, and appellee cites cases where the court's have held policies not to have been vitiated by the negligence or omission of an employe of the assured where the same could not be imputed to the latter. But in any event we think the instruction, as tendered, called for a too rigid construction of the policy in this respect, and that the modification was proper.

As to the alleged misrepresentation of the amount of plaintiff's loss by the previous burglary, with respect to which the evidence is conflicting, we cannot say that the verdict was against the weight of the evidence.

Nor was the verdict excessive if the jury computed interest on the loss from the date it was payable. It was within its province so to do even though they were given no instruction on the subject.

Appellant contends, but does not argue the point, that certain testimony was improperly admitted. We have reviewed the same and do not think there was reversible error in the court's ruling thereon.

It is further urged that plaintiff did not prove the market value of the goods. As to those on hand after the first burglary the proof was to the effect that their value of $11,000

recover was modified by the court to read:

> "Unless you shall further find that said employer alarm system was only temporarily out of repair, and that plaintiff used immediately all reasonable efforts to have repaired and burglar alarm system after it became out of repair."

It is urged by appellee that the provision that such system would always be used implies more representation and not a warranty. Whether it be regarded as one or the other the evidence identifies from which to infer negligence or fraud in the assured. If there was any negligence it was on the part of his employe, and appellee other cases where the owner's have held policies not to have been vitiated by the negligence or omission of an employe of the assured where the loss could not be imputed to the insured. But in any event we think the instruction, as tendered, called for a too rigid construction of the policy in this respect, and that the modification was proper.

As to the alleged misrepresentation of the amount of plaintiff's loss by the previous burglary, with respect to which the evidence is conflicting, we cannot say that the verdict was against the weight of the evidence.

Nor was the court's refusal to give the jury concerning interest on the loss from the date it was payable, in view of the provision as to the open account, error. Given no instruction on the subject.

Appellant contends, but does not argue the point, that certain testimony was improperly admitted. We have examined the same and do not think there was reversible error in the court's ruling thereon.

It is further argued that plaintiff did not prove the market value of the goods. As to this we think the first mortgage the proof was to the effect that their value of $1,000

was the market price. As to those subsequently purchased, we think the evidence tends to show that the invoices were the market prices and were so regarded by appellant's investigator and adjuster at the time of figuring the losses. There was no evidence to the contrary and many cases may be cited in which under such circumstance the courts have upheld the verdict on very meager and informal evidence of value.

With the exception of the error urged in modifying the instruction referred to most of the questions argued are questions of fact the determination of which by the jury we are not disposed to disturb.

As to the contention that proof of loss was not presented to appellant within the time required by the policies, if the requirement was not waived by appellant in sending its investigator to compute the same on the data furnished by appellee immediately after the burglary, yet the point was not specifically raised in the pleadings or otherwise at the trial.

Accordingly the judgment will be affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

was the market price. As to those subsequently purchased, we think the evidence tends to show that the invoices were the market prices and were so regarded by appellant's investigator and adjuster at the time of figuring the losses. There was no evidence to the contrary and many cases may be cited in which under such circumstances the courts have upheld the verdict on very meager and informal evidence of value.

With the exception of the error urged in modifying the instruction referred to most of the questions argued are questions of fact the determination of which by the jury we are not disposed to disturb.

As to the contention that proof of loss was not presented to appellant within the time required by the policies, if the requirement was not waived by appellant in sending its investigator to compute the same on the data furnished by appellee immediately after the burglary, yet the point was not specifically raised in the pleadings or otherwise at the trial.

Accordingly the judgment will be affirmed.

AFFIRMED.

Murrill and Gridley, JJ., concur.

(27,512)

160 - 27636

CHARLES GUHL & BROTHER,
a corporation,
Appellant,

vs.

CHICAGO, RACINE & MILWAUKEE LINE,
a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 612

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The main issue in this action upon which the case was tried, is whether appellee, the defendant, violated its duty as a common carrier to deliver within a reasonable time a shipment of strawberries transported by defendant's steamboat line from Racine, Wisconsin, to Chicago.

The judgment was for defendant entered upon the findings of court.

The shipment left Racine the evening of July 2nd and arrived at Chicago, Saturday, July 3, 1920. The boat was belated by heavy freight and fog so that its arrival was later than usual. Plaintiff's claim to damages, however, did not rest upon delay in its arrival but on defendant's alleged failure after arrival to deliver the goods to plaintiff's teamsters in time to enable plaintiff to sell them before noon of that day, after which time there was no market on Saturdays for the goods except to sell to peddlers at much lower prices.

The testimony for plaintiff was to the effect that its teamsters did not reach its store with the berries until between 11 a.m. and 12:15 p.m. that day, when the last of three loads was delivered at the store. As to the

100 - 27656

CHARLES GUNN, a MOTHER,
a corporation,
Appellant,

vs.

CHICAGO, RACINE & MILWAUKEE ALMA,
a corporation,
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

227 I.A. 612

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The main issue in this action upon which the case was tried, is whether appellee, the defendant, violated its duty as a common carrier to deliver within a reasonable time a shipment of strawberries transported by defendant's steamboat line from Racine, Wisconsin, to Chicago.

The judgment was for defendant entered upon the findings of court.

The shipment left Racine the evening of July 2nd and arrived at Chicago, Saturday, July 3, 1920. The boat was delayed by heavy freight and fog so that its arrival was later than usual. Plaintiff's claim to damages, however, did not rest upon delay in its arrival but on defendant's alleged failure after arrival to deliver the goods to plaintiff's teamsters in time to enable plaintiff to sell them before noon of that day, after which time there was no market on Saturdays for the goods except to sell to peddlers at much lower prices.

The testimony for plaintiff was to the effect that its teamsters did not reach its store with the berries until between 11 a.m. and 12:10 p.m. that day, when the last of three loads was delivered at the store. It is the

time the boat arrived and the berries were loaded plaintiff relied on the testimony of three teamsters. They testified the boat arrived about 11 o'clock. One said he got the berries for his load about 11 o'clock, and the other two said they got their loads about 11:30 a. m. But each admitted that he was absorbed in a game of cards which they were playing at the dock from 8:30 a. m. until 11 o'clock. It took about fifteen minutes to load and fifteen minutes to haul the berries to plaintiff's store. None of the witnesses could state the precise time the boat arrived or when they loaded, two of them saying that they did not look at a watch or clock, and the other "guessed" at the time and said no one had spoken to him about the matter until six months afterwards.

On the other hand both the captain and the checker and freight handler of the vessel testified that the vessel docked at Chicago at 9:05 the morning of July 3rd. The former said that when the teamsters were there, they were given the berries as soon as taken off the boat, and the latter testified that after its arrival the berries were taken off in a very few minutes and placed at the door where the commission men are called to take them, and that when they are there the berries are put on their wagons, and when not, the berries are sorted into piles for the different concerns to be loaded as called for. There was no evidence that the berries were called for before eleven o'clock that morning, and that the teamsters could not get them before that time. We think, therefore, the court's findings to the effect that there was no unreasonable delay on defendant's part to have the freight ready for delivery after arrival of the vessel in Chicago, and that the berries could have been had in sufficient time to be marketed had defendant's teamsters called for them, and that

time the boat arrived and the berries were loaded plaintiff relied on the testimony of three teamsters. They testified the boat arrived about 11 o'clock. One said he got the berries for his load about 11 o'clock, and the other two said they got their loads about 11:30 a. m. But each admitted that he was absorbed in a game of cards which they were playing at the dock from 8:30 a. m. until 11 o'clock. It took about fifteen minutes to load and fifteen minutes to haul the berries to plaintiff's store. None of the witnesses could state the precise time the boat arrived or when they loaded, two of them saying that they did not look at a watch or clock, and the other "guessed" at the time and said no one had spoken to him about the matter until six months afterwards.

On the other hand both the captain and the checker and freight handler of the vessel testified that the vessel docked at Chicago at 9:05 the morning of July 3rd. The former said that when the teamsters were there, they were given the berries as soon as taken off the boat, and the latter testified that after its arrival the berries were taken off in a very few minutes and placed at the door where the commission men are called to take them, and that when they are there the berries are put on their wagons, and when not, the berries are sorted into piles for the different concerns to be loaded as called for. There was no evidence that the berries were called for before eleven o'clock that morning, and that the teamsters could not get them before that time. We think, therefore, the court's findings to the effect that there was no unreasonable delay on defendant's part to have the freight ready for delivery after arrival of the vessel in Chicago, and that the berries could have been had in sufficient time to be marketed had defendant's teamsters called for them, and that

being engrossed in a game of cards they deferred loading for nearly two hours after the boat's arrival, were justified by the evidence.

Complaint is made of admission of some evidence. As the trial was before the court without a jury we need not consider the point, for if the evidence was not relevant the court presumably disregarded it, and the testimony complained of had no material bearing on the controlling fact, as above stated, upon which the case was decided.

Appellee was put to the unnecessary expense of providing an additional abstract stating matters necessary for the decision of this case. Its cost will be taxed against appellant.

The judgment is affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

being approached in a game of cards they referred looking for nearly two hours after the boat's arrival, were justified by the evidence.

Complaint is made of admission of some evidence. As the trial was before the court without a jury we need not consider the point, for if the evidence was not relevant the court presumably disregarded it, and the testimony complained of had no material bearing on the controlling fact, as above stated, upon which the case was decided.

Appellee was put to the unnecessary expense of providing an additional abstract stating matters necessary for the decision of this case. Its cost will be taxed against appellant.

The judgment is affirmed.

AFFIRMED.

Merrill and Grafday, JJ., concur.

219 - 27695

ARMOUR & COMPANY, Appellee,

vs.

DAVID ROSENHEIM, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

227 I.A. 612

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This is an action brought to recover the balance of alleged purchase price of 50 boxes of cheese. From a judgment upon the jury's verdict in favor of plaintiff assessing its damages at $421.50 this appeal is taken. The transaction out of which the controversy arose was as follows:

Appellant Rosenheim, then an employe of the Fruitvale Grocery & Market Co. went to appellee's Evanston store with Metz, the manager of the Evanston branch of the Fruitvale Co., and there conferred with Coover, appellee's local manager, with reference to buying some cheese. The price mentioned was 25¢ a pound. There is no question here about the price. Rosenheim said he would take 50 boxes of that cheese, 25 to be sent that day or the next, and the remaining 25 to be left until ordered out, as the Fruitvale Co. had no room or facilities for handling so much at a time. Coover replied that as the Fruitvale Co. had not established a line of credit with Armour & Co. if he wanted the cheese it would have to be charged to some one else, whereupon Rosenheim said: "Charge it to me." Accordingly the first 25 boxes were invoiced to Rosenheim and delivered as directed at the Fruitvale Co.'s place of business and were charged on plaintiff's books to Rosenheim and were paid for.

ARMOUR & COMPANY,	Appellee,	APPEAL FROM
		MUNICIPAL COURT
vs.		OF CHICAGO.
DAVID ROSENHEIM,	Appellant.	

MR. PRESIDING JUSTICE MCGURN

DELIVERED THE OPINION OF THE COURT.

This is an action brought to recover the balance of alleged purchase price of 50 boxes of cheese. From a judgment upon the jury's verdict in favor of plaintiff assessing its damages at $221.50 this appeal is taken. The transaction out of which the controversy arose was as follows:

Appellant Rosenheim, then an employe of the Fruitvale Grocery & Market Co. went to appellee's Swanston store with Mots, the manager of the Swanston branch of the Fruitvale Co., and there conferred with Cooper, appellee's local manager, with reference to buying some cheese. The price mentioned was 25¢ a pound. There is no question here about the price. Rosenheim said he would take 50 boxes of that cheese, 25 to be sent that day or the next, and the remaining 25 to be left until ordered out, as the Fruitvale Co. had no room or facilities for handling so much at a time. Cooper replied that as the Fruitvale Co. had not established a line of credit with Armour & Co. if he wanted the cheese it would have to be charged to some one else, whereupon Rosenheim said: "Charge it to me." Accordingly the first 25 boxes were invoiced to Rosenheim and delivered as directed at the Fruitvale Co.'s place of business and were charged on plaintiff's books to Rosenheim and were paid for.

Later Coover was called up by telephone and asked to send the other 25 boxes, which were also sent to the store of the Fruitvale Co., invoiced and charged as before. It is for the price of the second delivery that this suit was brought, Rosenheim claiming that the original purchase was for 25 boxes only. But it appears from the testimony of Metz, who accompanied him, that Rosenheim said at the time of the purchase: "I will take 50 cases, 25 to be sent out now and 25 on order," and corroborates the testimony of Coover as to whom credit was extended. Metz also testified that Rosenheim told him that they had "25 cases out at Armour's," and directed that it be ordered out; that thereupon he called up Coover on the telephone, and ordered delivery of the same. In his testimony Rosenheim admitted that at the time of purchase he said: "We can use 50 boxes of this," and that he told Coover to "send 25 boxes down there and then when they want the other 25 they will order it out." This testimony was certainly sufficient to warrant the verdict of the jury that there was a sale of 50 boxes, and that the credit was extended to Rosenheim.

We find no room for appellant's contention that there was a breach of the contract by plaintiff or that there was any error in receiving in evidence plaintiff's alleged accounts, the original invoices from which they were made having been introduced in evidence and showing that credit was extended to Rosenheim. No particular error in instructions is pointed out and none is apparent.

Accordingly the judgment is affirmed.

AFFIRMED.

Morrill and Gridley, JJ., concur.

Later Cooper was called up by telephone and asked to send the other 25 boxes, which were also sent to the store of the Fruitvale Co., involved and charged as before. It is for the price of the second delivery that this suit was brought. Rosenbaum claiming that the original purchase was for 25 boxes only. But it appears from the testimony of Keth, who accompanied him, that Rosenbaum said at the time of the purchase: "I will take 50 cases, 25 to be sent out now and 25 on order," and corroborates the testimony of Cooper as to when credit was extended. Keth also testified that Rosenbaum told him that they had "25 cases out at Atmore's," and directed that it be ordered out; that thereupon he called up Cooper on the telephone, and ordered delivery of the same. In his testimony Rosenbaum admitted that at the time of purchase he said: "We can use 50 boxes of this," and that he told Cooper to "send 25 boxes down there and then when they want the other 25 they will order it out." This testimony was certainly sufficient to warrant the verdict of the jury that there was a sale of 50 boxes, and that the credit was extended to Rosenbaum.

We find no room for appellant's contention that there was a breach of the contract by plaintiff or that there was any error in receiving in evidence plaintiff's alleged accounts, the original invoices from which they were made having been introduced in evidence and showing that credit was extended to Rosenbaum. No particular error in instructions is pointed out and none is apparent.

Accordingly the judgment is affirmed.

AFFIRMED.

Morrill and Grigsby, JJ., concur.

6873

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 613

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 22 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 6873 No. 7.

Charles E. Smith, appellee

vs. Appeal from La Salle

Frank C. Bellrose, appellant,

Jones, P.J.

This is a suit in assumpsit upon a declaration consisting of a special count and six other counts in indebitatus assumpsit, the last being the consolidated common counts. The special count alleged that the appellee Charles E. Smith leased to the appellant Frank C. Bellrose, a tract of land described as the east 10.50 acres of the east one-half, lying north of the canal of the north half of the south-west quarter of Section 18 in Township 33, North, Range 3 east of the Third Principal Meridian in La Salle County, Illinois, upon terms and conditions set out in haec verba in said count. The land contained valuable deposits of sand rock which appellant wished to mine, remove and sell.

No question is raised on the pleadings. Upon a trial in the Circuit Court there was a verdict for the plaintiff -- appellee here -- in the sum of $650 upon which the court entered judgment after overruling motions to set aside the verdict and in arrest of judgment.

This case has been before this court twice before and is reported as Smith vs. Bellrose, 200 Ill. App. 368 where we reversed a judgment of the circuit court in favor of the appellee for $1.00 and again as Smith vs. Bellrose, 213 Ill. App. 656 (opinion not published) wherein we reversed a judgment for the appellee for $1,478.50 upon a directed verdict.

Harry W. Bellrose, brother of the appellant, leased the premises above described, from the appellee for a term beginning February 1st, 1904, and ending July 30, 1908, for the purpose of mining, removing and selling the sand thereon. The lease provided for the payment of a royalty of five cents a ton on the sand. Being unable to carry out the terms of the said lease, Bellrose so informed appellee in the presence of appellant. Appellant then entered into negotiations with appellee for a lease of the premises for the same purpose.

General No. 6872 No. 7.

Charles E. Smith, appellee

vs. Appeal from La Salle

Frank C. Ballrose, appellant.

Jones, P.J.

This is a suit in assumpsit upon a declaration consisting of a special count and six other counts in indebitatus assumpsit, the last being the consolidated common counts. The special count alleged that the appellee Charles E. Smith leased to the appellant Frank C. Ballrose, a tract of land described as the west 10.80 acres of the east one-half, lying north of the canal of the north half of the south-west quarter of Section 12 in Township 33, North, Range 3 east of the Third Principal Meridian in La Salle County, Illinois, upon terms and conditions set out in said verbs in said count. The land contained valuable deposits of sand rock which appellant wished to mine, remove and sell.

No question is raised on the pleadings. Upon a trial in the Circuit Court there was a verdict for the plaintiff -- appellee here -- in the sum of $850 upon which the court entered judgment after overruling motions to set aside the verdict and in arrest of judgment.

This case has been before this court twice before and is reported as Smith vs. Ballrose, 203 Ill. App. 588 where we reversed a judgment of the circuit court in favor of the appellee for $1.00 and again as Smith vs. Ballrose, 213 Ill. App. 089 (opinion not published) wherein we reversed a judgment for the appellee for $1,670.00 upon a directed verdict.

Harry W. Ballrose, brother of the appellant, leased the premises above described, from the appellee for a term beginning February 1st, 1904, and ending July 30, 1906, for the purpose of mining, removing and selling the sand thereon. The lease provided for the payment of a royalty of five cents a ton on the sand. Being unable to carry out the terms of the said lease, Ballrose so informed appellee in the presence of appellant. Appellant then entered into negotiations with appellee for a lease of the premises for the same purpose.

The Chicago, Rock Island and Pacific Railroad right of way extends across the land from east to west, and is not excepted from the description of the premises set out in the lease above mentioned. Appellant admits he agreed to pay the stipulated royalty, but contends that he entered into a verbal lease with appellee; that he leased only the land owned by appellee at that point; that appellee did not own the right of way of the railroad; that the sand for which recovery is sought came from the right of way; and that he is not bound to pay appellee for sand belonging to the railroad.

Appellee admits that all of the sand for which recovery is sought came from the right of way but contends that the right of way was included in the lease and that appellant entered into possession of the right of way under the lease and removed the sand in question; and having so entered appellant cannot deny his landlord's title without first surrendering to him all the premises into which he entered under the lease. Appellee also contends that he is the owner of an undivided interest in the fee (or reversion) of the right of way, having a right to the sand thereon subject to the rights of the railroad; but we do not think a consideration of that claim or a consideration of the rights of the railroad company is necessary to a decision of this case.

Upon a review of the evidence we find that appellant testified that appellee claimed to own the land on which the right of way was located; that he, appellant, entered upon all of said land included in the right of way, believing the same belonged to the appellee; and that he paid rent thereon to the appellee. He further testified that he had no other understanding of the situation until the officials of the railroad objected to the removal of sand so close to the tracks that it endangered the road. Appellant further testified that after he began mining sand he had a conversation with the appellee in which he inquired whether the appellee owned the land from which the sand was taken and the appellee answered in the affirmative. The court permitted him to make as full proof as he could relative to the land included in the lease and relative to the land occupied by him under

The Chicago, Rock Island and Pacific Railroad right of way extends across the land from east to west, and is not excepted from the description of the premises set out in the lease above mentioned. Appellant admits he agreed to pay the stipulated royalty, but contends that he entered into a verbal lease with appellee; that he leased only the land owned by appellee at that point; that appellee did not own the right of way of the railroad; that the sand for which recovery is sought came from the right of way; and that he is not bound to pay appellee for sand belonging to the railroad.

Appellee admits that all of the sand for which recovery is sought came from the right of way but contends that the right of way was included in the lease and that appellant entered into possession of the right of way under the lease and removed the sand in question; and having so entered appellant cannot deny his landlord's title without first surrendering to him all the premises into which he entered under the lease. Appellee also contends that he is the owner of an undivided interest in the fee (or reversion) of the right of way, having a right to the sand thereon subject to the rights of the railroad; but we do not think a consideration of that claim or a consideration of the rights of the railroad company is necessary to a decision of this case.

Upon a review of the evidence we find that appellant testified that appellee claimed to own the land on which the right of way was located; that he, appellant, entered upon all of said land included in the right of way, believing the same belonged to the appellee; and that he paid rent thereon to the appellee. He further testified that he had no other understanding of the situation until the officials of the railroad objected to the removal of sand so close to the tracks that it endangered the road. Appellant further testified that after he began mining sand he had a conversation with the appellee in which he inquired whether the appellee owned the land from which the sand was taken and the appellee answered in the affirmative. The court permitted him to make as full proof as he could relative to the land included in the lease and relative to the land occupied by him under

the lease pursuant to our ruling on the last appeal. From his own testimony it is apparent that he entered into possession of the right of way as a part of the land leased to him by the appellee. He could not thereafter deny his landlord's title without first surrendering to his landlord the possession of all the land into which he entered as a tenant even though both he and the landlord were mistaken with respect to the ownership of the land. (Doty vs. Burdick, 83 Ill. 473; Macken vs. Haven, 187 Ill. 480; Mohannah vs. Mohannah, 292 Ill. 133)

The appellant complains of the assumption in instructions 4,5,6 and 8 that the land in question was included in the oral lease. In view of appellant's own admission that he entered upon the premises under the lease supposing the land to belong to appellee who claimed it, we think the question was no longer one for the jury and that it was not error for the court to assume that fact in the instructions. Instructions 7 and 9 do not assume that the oral agreement included the right of way as contended by appellant.

Instruction number 55 tendered by the appellant and refused by the court was properly refused because it ignores elements of facts contained in appellant's own admissions on the witness stand. He is clearly bound by his admissions and cannot thereafter have an instruction given to the jury which adopts a theory of the case inconsistent in fact and law with such admissions. Instructions 47 and 49 tendered by appellant were properly refused because they assert that title in the railroad to the right of way is a complete defense to the suit for collection of rent thereon and completely ignore the question of whether such right of way was included in the lease or whether the appellant entered thereon under the lease.

Appellant complains that the court refused to hear evidence upon the plea of set-off after counsel for appellee had stated to the court that appellee did not claim pay for sand mined north of the right of way of the railroad, and that he was thus not permitted to prove that he had at considerable expense removed the top cover of soil from the rock and sand on appellee's land north of the right of way. The

the lease pursuant to our ruling on the last appeal. From his own testimony it is apparent that he entered into possession of the right of way as a part of the land leased to him by the appellee. He could not thereafter deny his landlord's title without first surrendering to his landlord the possession of all the land into which he entered as a tenant even though both he and the landlord were mistaken with respect to the ownership of the land. (Doty vs. Burdick, 88 Ill. 472; Mackey vs. Davis, 107 Ill. 686; Mohammed vs. Mohammed, 208 Ill. 133)

The appellant complains of the assumption in instructions 4,5,6 and 8 that the land in question was included in the oral lease. In view of appellant's own admission that he entered upon the premises under the lease supposing the land to belong to appellee who claimed it, we think the question was no longer one for the jury and that it was not error for the court to assume that fact in the instructions. Instructions 7 and 9 do not assume that the oral agreement included the right of way as contended by appellant.

Instruction number 55 tendered by the appellant and refused by the court was properly refused because it ignores elements of fact contained in appellant's own admissions on the witness stand. He is clearly bound by his admissions and cannot therefore have an instruction given to the jury which adopts a theory of the case inconsistent in fact and law with such admissions. Instructions 17 and 49 tendered by appellant were properly refused because they assert that title in the railroad to the right of way is a complete defense to the suit for collection of rent thereon and completely ignore the question of whether such right of way was included in the lease or whether the appellant entered thereon under the lease.

Appellant complains that the court refused to hear evidence upon the plea of set-off after counsel for appellee had stated to the court that appellee did not claim pay for sand which north of the right of way of the railroad, and that he was thus not permitted to prove that he had at considerable expense removed the top cover of soil from the rock and sand on appellee's land north of the right of way. The

claim of set-off rested upon an alleged eviction of the appellant from the premises by the appellee. While there is some confusion in the record concerning the grounds for the ruling complained of, an examination of the record discloses that the court permitted the appellant to introduce all the testimony he offered tending to show an eviction. The evidence upon this question is substantially the same as it was upon the first appeal. We then held (Smith vs. Belrose, 213 Ill. App. 368) that an eviction was not shown and therefore no right to a set-off was proven. With the state of the record in the same condition it then was, we must again hold that an eviction was not shown. It follows that the court correctly excluded evidence of the cost to the appellant of stripping the top soil from the sand north of the right of way. There being no substantial error in the record the judgment will be affirmed.

Judgment affirmed.

claim of set-off rested upon an alleged eviction of the appellant from the premises by the appellee. While there is some confusion in the record concerning the grounds for the ruling complained of, an examination of the record discloses that the court permitted the appellant to introduce all the testimony he offered tending to show an eviction. The evidence upon this question is substantially the same as it was upon the first appeal. We in a held (Smith vs. Bellows, 313 Ill. App. 358) that an eviction was not shown and therefore no right to a set-off was proven. With the state of the record in the same condition it then was, we must again hold that an eviction was not shown. It follows that the court correctly excluded evidence of the cost to the appellant of stripping the top soil from the sand north of the right of way. There being no substantial error in the record the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

13

R. H. denied on 4-1-23.

7013

2635A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I A. 613 2

BE IT REMEMBERED, that afterwards, to-wit: on OCT. 2[illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7013 No. 1.

W. R. Hunter, Appellant,

vs. Appeal from Kankakee

Frank Belleau, Appellee,

Jones, P.J.

Appellant was driving his automobile west on Court Street in the City of Kankakee about 6:15 P.M. of June 6th, 1920, on his way to the Big Four Depot. Chicago Avenue runs north and south and intersects Court Street at right angles. Appellant in his course to the depot turned north to go up North Chicago Avenue. Just as the turn was being made or immediately thereafter a collision occurred between his car and a car owned and operated by appellee. The steering wheel of appellant's car was thereby made to spin and in doing so wrenched, broke and otherwise injured appellant's wrist.

Appellant brought this action on the case to redover damages alleged to have been sustained by him in the accident. He filed a declaration containing three counts. The first charged general negligence. The second charged that appellee was guilty of negligence in that he violated Section 2 of a certain ordinance of the City of Kankakee, which provides that a vehicle, except when passing another vehicle ahead, shall keep as near the right hand curb as safety and prudence will permit. The ngeligence charged in the third count is that appellee violated the Statute of this State in not seasonably turning his automobile to the right so as to pass the automobile of appellant without interference. A verdict was returned in favor of appellee and a judgment entered thereon.

Both Court Street and North Chicago Avenue are paved streets with curbing on each side. North Chicago Avenue is 30.2 feet between the curbing and Court Street is 68 feet between the curbing. The evidence is very conflicting as to the position of the two cars at and just before the accident and also as to the rate of speed each car was then travelling. There is testimony tending

General No. 7013 No. 1.

W. R. Hunter, Appellant,

vs. Appeal from Kankakee

Frank Ballsen, Appellee.

Jones, P.J.

Appellant was driving his automobile west on Court Street in the City of Kankakee about 6:15 P.M. of June 6th, 1920, on his way to the Big Four Depot. Chicago Avenue runs north and south and intersects Court Street at right angles. Appellant in his course to the depot turned north to go up North Chicago Avenue. Just as the turn was being made or immediately thereafter a collision occurred between his car and a car owned and operated by appellee. The steering wheel of appellant's car was thereby made to spin and in doing so wrenched, broke and otherwise injured appellant's wrist.

Appellant brought this action on the case to recover damages alleged to have been sustained by him in the accident. He filed a declaration containing three counts. The first charged general negligence. The second charged that appellee was guilty of negligence in that he violated Section 2 of a certain ordinance of the City of Kankakee, which provides that a vehicle, except when passing another vehicle ahead, shall keep as near the right hand curb as safety and prudence will permit. The negligence charged in the third count is that appellee violated the Statute of this State in not reasonably turning his automobile to the right so as to pass the automobile of appellant without interference. A verdict was returned in favor of appellee and a judgment entered thereon.

Both Court Street and North Chicago Avenue are paved streets with curbing on each side. North Chicago Avenue is 30.3 feet between the curbing and Court Street is 58 feet between the curbing. The evidence is very conflicting as to the position of the two cars at and just before the accident and also as to the rate of speed each car was then travelling. There is testimony tending

to show that appellee's car was going south on North Chicago Avenue on the left hand side thereof close to the gutter and that appellee did not seasonably turn his car to the right so that appellant's car could pass without interference. There is also evidence tending to show that appellee had been running his car immediately before the accident at a speed which was unreasonable having regard for the traffic and the use of the way. On the other hand, there is evidence tending to show that although appellee had been on the left side of North Chicago Avenue, he had turned over to the right side thereof before appellant turned into said Avenue; that appellant was operating his automobile on Court Street at a speed greater than was reasonable having regard for the traffic and the use of the way and was unable to turn into North Chicago Avenue without swinging far out beyond the middle of said Avenue; and that in so doing his car struck appellee's car.

Under such a situation a verdict should not be disturbed if the jury was accurately instructed as to the law applicable in the case. (C. N.W. R.R. Co. vs. Dunick, 96 Ill. 42)

At the request of appellee the court gave instruction No. 15 in which the law was stated to be that if the jury "Believe from the evidence that both plaintiff and defendant were driving automobiles along the public streets of the City of Kankakee at the time and place in question, then each was under the same obligation to use due and reasonable care; that the rights of both upon the streets were equal; that neither had a right to use the street that was superior to the right of the other. And in this case, if you believe from the evidence that the injury to the plaintiff, if any, would ~~have~~ not have been received by him if he had been driving his car in a careful and prudent manner, then you are instructed that the plaintiff can not recover" etc. In our judgment this instruction is erroneous and misleading under the facts and was calculated to have been prejudicial to appellant. The ordinance of the City of Kankakee which was offered in evidence requires the driver of an automobile to keep his car as near the right hand curb of the street

to show that appellee's car was going south on North Chicago Avenue on the left hand side thereof close to the gutter and that appellee did not reasonably turn his car to the right so that appellant's car could pass without interference. There is also evidence tending to show that appellee had been running his car immediately before the accident at a speed which was unreasonable having regard for the traffic and the use of the way. On the other hand, there is evidence tending to show that although appellee had been on the left side of North Chicago Avenue, he had turned over to the right side thereof before appellant turned into said Avenue; that appellant was operating his automobile on Court Street at a speed greater than was reasonable having regard for the traffic and the use of the way and was unable to turn into North Chicago Avenue without swinging far out beyond the middle of said Avenue; and that in so doing his car struck appellee's car.

Under such a situation a verdict should not be disturbed if the jury was accurately instructed as to the law applicable in the case. (C. N.W. R.R. Co. vs. Dunlok, 96 Ill. 42)

At the request of appellee the court gave instruction No. 15 in which the law was stated to be that if the jury "Believe from the evidence that both plaintiff and defendant were driving automobiles along the public streets of the City of Kankakee at the time and place in question, then each was under the same obligation to use due and reasonable care; that the rights of both upon the streets were equal; that neither had a right to use the street that was superior to the right of the other. And in this case, if you believe from the evidence that the injury to the plaintiff, if any, would ~~have~~ not have been received by him if he had been driving his car in a careful and prudent manner, then you are instructed that the plaintiff can not recover" etc. In our judgment this instruction is erroneous and misleading under the facts and was calculated to have been prejudicial to appellant. The ordinance of the City of Kankakee which was offered in evidence requires the driver of an automobile to keep his car as near the right hand curb of the street

as safety and prudence will permit. Under this ordinance the right of appellee to run his car on the east side of North Chicago Avenue when going south was not equal to right of appellant to that side of the street, when going north. Appellant had a superior right to use the east side of said Avenue at that time. The force of the instruction given was to nullify the legal effect of the ordinance. One of the counts of the declaration was predicated upon that ordinance. Appellant offered testimony which tended to support the material averments of that count. Therefore, the harmful effect of instruction No. 15 must be apparent.

Complaint is also made of instruction No. 18 given by the court on behalf of appellee. This instruction told the jury that even though they should believe from the evidence that appellee did drive his car on the left side of the street in question, nevertheless, if he turned his car to the right side of the street in reasonable time to permit the plaintiff's automobile to pass and if the jury further believe from the evidence that if the plaintiff had been in the exercise of reasonable care, he could have avoided the collision by turning to his right and failed to do so, then there can be no recovery in this case. Like instruction No. 15, the instruction now under consideration directs a verdict. Consequently the circumstances under which the verdict should be rendered under such instruction should be consistent with the facts and the law in the case. It is the contention of appellant, and there is testimony tending to support such contention, that immediately upon his turning into North Chicago Avenue he was put in a place of danger because of appellee's being on the wrong side of the street; that he used his best judgment to avoid the accident, but was unable to do so. When a person finds himself placed in a dangerous situation through the negligent act of another he is not bound to do the very thing which will extricate him from his danger. All the law required of him is to do that which an ordinarily reasonable person would do under like circumstances. One who has, through his own negligence, put another in danger can not excuse himself by saying if such other

as safety and prudence will permit. Under this ordinance the right of appellee to run his car on the east side of North Chicago Avenue when going south was not equal to right of appellant to that side of the street, when going north. Appellant had a superior right to use the east side of said Avenue at that time. The force of the instruction given was to nullify the legal effect of the ordinance. One of the counts of the declaration was predicated upon that ordinance. Appellant offered testimony which tended to support the material averments of that count. Therefore, the harmful effect of instruction No. 15 must be apparent.

Complaint is also made of instruction No. 18 given by the court on behalf of appellee. This instruction told the jury that even though they should believe from the evidence that appellee did drive his car on the left side of the street in question, nevertheless, if he turned his car to the right side of the street in reasonable time to permit the plaintiff's automobile to pass and if the jury further believe from the evidence that if the plaintiff had been in the exercise of reasonable care, he could have avoided the collision by turning to his right and failed to do so, then there can be no recovery in this case. Like instruction No. 15, the instruction now under consideration directs a verdict. Consequently the circumstances under which the verdict should be rendered under such instruction should be consistent with the facts and the law in the case. It is the contention of appellant, and there is testimony tending to support such contention, that immediately upon his turning into North Chicago Avenue he was put in a place of danger because of appellee's being on the wrong side of the street; that he used his best judgment to avoid the accident, but was unable to do so. When a person finds himself placed in a dangerous situation through the negligent act of another he is not bound to do the very thing which will extricate him from his danger. All the law requires of him is to do that which an ordinarily reasonable person would do under like circumstances. One who has, through his own negligence, put another in danger can not excuse himself by saying if such other

person had done this or that he would have avoided injury. According to appellant's testimony there was not room to pass appellee on the right side when he turned into the Avenue and appellee's car was coming straight toward him. He then turned to the left seeking to avoid a collision just at about the same time appellee turned his car toward the west and the collision resulted. Whether appellant's acts under the circumstances were those of an ordinarily reasonable person was a question for the jury. The court should not have undertaken to tell the jury what was a reasonable act or what was not a reasonable act under the circumstances. (Chicago City Ry. Co. vs. O'Donnell, 208 Ill. 267; N. Chicago Street Ry. v. Erwin, 202 Ill. 354; Roberts vs. City Ry. 262 Ill. 228)

We also think that the 12th instruction is erroneous because it assumes that in turning the corner at said street intersection, appellant was operating his car at an unlawful speed. The location on the street of the accident was one of the questions in dispute in this case. Hence the instruction should not have assumed to decide that question. Furthermore, the instruction seems to assume that the Statute limits the speed of automobiles in turning such corners as the one in question, to six miles per hour. Such is not the law. Speed in excess of six miles per hour at such a corner is made prima facie evidence of negligence but where there is testimony tending to overcome such prima facie evidence, it is then a question for the jury to determine whether or not such speed is or is not greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. (Berg vs. Marshall, 196 Ill. App. 209; Johnson vs. Pendergast, opinion filed Aug. 5th, 1922)

During the progress of the trial some of the jurors went to the place where the accident in question is said to have occurred. They there made measurements and other observations which it is said they considered in arriving at their verdict. Appellant on the hearing of his motion to set aside the verdict and for a new trial

person had done this or that he would have avoided injury. According to appellant's testimony there was not room to pass appellee on the right side when he turned into the Avenue and appellee's car was coming straight toward him. He then turned to the left seeking to avoid a collision just at about the same time appellee turned his car toward the west and the collision resulted. Whether appellant's acts under the circumstances were those of an ordinarily reasonable person was a question for the jury. The court should not have undertaken to tell the jury what was a reasonable act or what was not a reasonable act under the circumstances. (Chicago City Ry. Co. vs. O'Donnell, 208 Ill. 287; W. Chicago Street Ry. v. Irwin, 203 Ill. 354; Roberts vs. City Ry. 188 Ill. 288)

We also think that the 13th instruction is erroneous because it assumes that in turning the corner at said street intersection, appellant was operating his car at an unlawful speed. The location on the street of the accident was one of the questions in dispute in this case. Hence the instruction should not have assumed to decide that question. Furthermore, the instruction seems to assume that the Statute limits the speed of automobiles in turning such corners as the one in question, to six miles per hour. Such is not the law. Speed in excess of six miles per hour at such a corner is made prima facie evidence of negligence but where there is testimony tending to overcome such prima facie evidence, it is then a question for the jury to determine whether or not such speed is or is not greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. (Berg vs. Marshall, 189 Ill. App. 309; Johnson vs. Pendergrast, opinion filed Aug. 5th, 1922)

During the progress of the trial some of the jurors went to the place where the accident in question is said to have occurred. They there made measurements and other observations which it is said they considered in arriving at their verdict. Appellant on the hearing of his motion to set aside the verdict and for a new trial

offered to make proof of this circumstance by means of affidavits of a certain juror, and he requested the court to have other jurors brought before it and examined under oath as to this subject matter. The court declined to consider such proof and we think justly so. They could not be heard to impeach their own verdict. (Wykoff vs. Chicago City Ry. Co. 234 Ill. 613; Chicago vs. Saldman, 234 Ill. 625)

Because of the errors committed on the trial, this cause must be reversed and remanded.

Reversed and remanded.

offered to make proof of this circumstance by means of affidavits of a certain juror, and be requested the court to have other jurors brought before it and examined under oath as to this subject matter. The court declined to consider such proof and we think justly so. They could not be heard to impeach their own verdict. (Wyckoff vs. Chicago City Ry. Co. 234 Ill. 613; Chicago vs. Saldman, 224 Ill. 325)

Because of the errors committed on the trial, this cause must be reversed and remanded.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of April in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7050

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 5 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

David Sterling Bevier, Defendant in Error,

vs.

Error to Circuit Court of Stark County.

M. L. Hay, Trustee, etc.
Plff. in error,

Jones P. J.

Mordecai Bevier, now deceased, by his last will bequeathed certain property to the defendant in error, David Sterling Bevier. A codicill to said Will so far as it relates to the subject matter of this suit is as follows:-"My son, David Sterling Bevier having acquired and become addicted to the excessive use of intoxicating liquors since the date of said Will now, therefore, if he permanently reforms and quits the use of intoxicating liquors altogether, in any quantity or for any purpose during my lifetime, then my said Will shall stand as it is written, but if my said son, David Sterling Bevier continues the use of intoxicating liquors as a beverage to any extent whatever, or for any length of time hereafter, then and in that case,---I do hereby nominate and appoint my daughter Minnie M. Bevier---as trustee of my said son, David Sterling Bevier--in trust for the use and benefit of the said--David Sterling Bevier; and I direct that the income derived therefrom be paid to him--but in case (he) shall permanently quit the use of intoxicating liquors, and shall permanently reform in that respect, then I direct that his full share and proportion of my estate shall be transferred and paid over to him."

After the death of the said test tor, Minnie M. Bevier assumed the duties of trustee under said Will. She afterwards resigned and M. L. Hay, the plaintiff in error, was appointed and qualified as such trustee.

The bill in this case represents that at the time the testator departed this life the said plaintiff in error was still addicted to the excessive use of intoxicating liquors, but that for a con-

David Sterling Davies, Deceased.
estate.

vs.

M. E. Day, Proponent.

Petition in error.

June 2, 1.

Morris, J. of P., delivered, on the last will and testament, solely to the date [illegible] Sterling Davies. A codicil to said will [illegible] of this unit is as follows:-"My son, [illegible] acquired and [illegible] dedicated to [illegible] liquors since the date of said will, [illegible] in any quantity or [illegible] said will shall [illegible] sterling Davies [illegible] coverage to any extent [illegible] then and in that case,---I [illegible] Minnie M. Davies --- [illegible] in trust for the [illegible] and I direct that [illegible] but in case (he) shall [illegible] liquors, and shall [illegible] that his will [illegible] and pull [illegible]."

After the death of the [illegible] passed the duties of [illegible] postmaster [illegible] qualified [illegible] probate.

The will in this [illegible] dopted this [illegible] to the excessive use of [illegible]

tinuous period of more than two years prior to the filing of the bill in this case, he has entirely ceased the use of intoxicating liquor as a beverage and during all the time from such date up to and including the present time, he has totally abstained from the use of intoxicating liquor, and has permanently reformed in the matter of drinking intoxicating liquor, and for more than two years last passed to the present time he has continuously abstained from drinking or use of intoxicating liquor and has entirely redeemed himself from the drinking habit. The bill prays that the said trustee shall pay to the said plaintiff in error the sum of $4613 or so much thereof as remains in said trust fund after paying the proper charges against the same on account of said trustee. An answer was filed by the Trustee, the defendant in error, denying that he has any knowledge of said alleged reform of the plaintiff in error; alleging that the said Bevier has moved away from the State of Illinois where the defendant has not been personally able to observe his habits; and denying that the said Bevier has fully reformed in his habits as required by the terms of the Will.

Upon a hearing a decree was entered in favor of the defendant in error, requiring the plaintiff in error to account to the said Bevier at the next term of said court. This cause is now brought here for review.

The evidence in the case consisted very largely of depositions taken in the State of California where the defendant in error has been for a number of years. It tends to show that Bevier has entirely abstained from the use of intoxicating liquors for more than two years last passed; th t he has had frequent opportunity to drink intoxicating liquor but has invariably declined so to do; that he is a man of good character and is now a man of sober habits. The plaintiff in error offered no evidence tending to rebut this

tinuous period of more than two years prior to the filing of the bill in this case, he has entirely ceased the use of intoxicating liquor as a beverage and during all the time from such date up to and including the present time, he has totally abstained from the use of intoxicating liquor, and has commendably reformed in the matter of drinking intoxicating liquor, and for more than two years last passed to the present time he has continuously abstained from drinking or use of intoxicating liquor and has entirely redeemed himself from the drinking habit. The bill prays that the said trustee shall pay to the said plaintiff in error the sum of $4613 or so much thereof as remains in said trust fund after paying the proper charges against the same on account of said trustee. An answer was filed by the trustee, the defendant in error, denying that he has any knowledge of said alleged reform of the plaintiff in error; alleging that the said Dexter has moved away from the State of Illinois where the defendant has not been personally able to observe his habits; and denying that the said Dexter has fully reformed in his habits as required by the terms of the Will.

Upon a hearing a decree was entered in favor of the defendant in error, requiring the plaintiff in error to account to the said Dexter at the next term of said court. This case is now brought here for review.

The evidence in the case is quite very largely of reformations taken in the State of California where the defendant in error has been for a number of years. It tends to show that Dexter has entirely abstained from the use of intoxicating liquors for more than two years last passed; that he has had frequent opportunity to drink intoxicating liquor but has intirely declined to do so; that he is a man of good character and is now a man of sober habits. The plaintiff in error offered no evidence tending to rebut this

testimony. The defense was wholly technical and wanting in circumstances. We think the pleadings and proof were presented to us by a sufficient record and under the facts as disclosed by such record and under the provisions of the Will as the same are construed in Bevier vs. Hay, 221 Ill. App. 1, the defendant in error is entitled to a restoration of his property and to a discharge of the trustee. The decree of the chancellor is therefore affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov, in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

Rec'd
12-13-22

7068

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice..
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

General No. 7068 No. 22.

E. R. Mickelberry,

Appellant,

vs. Appeal from Peoria

Arthur Keithley,

Appellee,

Jones, P.J.

This is an appeal from a decree of the Circuit Court of Peoria County dissolving an injunction restraining appellee from selling a certain note for $15,000 secured by a mortgage on real estate and dismissing the bill as to appellee, Keithley, for want of equity.

Appellant, Mickelberry, was the owner of certain real estate in Adams County, Illinois, containing about 222 acres. He contracted to sell the same to John B. King. Subsequently, on March 9, 1920, King contracted to sell it to Edmund H. Dwyer. The deal was not completed for some time thereafter because of objections made by Dwyer's attorney to the title as shown by the abstract. About September 1st, King and Mickelberry entered into an arrangement between themselves, whereby a deed was made by Mickelberry to Dwyer. The latter executed and delivered to King the said note for $15,000 secured by a mortgage on said real estate. The uncontradicted evidence shows that under the arrangement between King and Mickelberry, the said note and mortgage were taken for the use and benefit of both King and Mickelberry and that King's interest in said note amounted to about $1,000 and the remaining interest belonged to Mickelberry. The note and mortgage were left in King's custody under a declaration by him that he would dispose of the same to the Masonic Lodge in Peoria for cash and retain from the proceeds of the sale the amount due him and pay the remainder to Mickelberry. King endeavored to make a sale of the note and mortgage to the said Lodge but his efforts were not successful. Later King deposited the note and mortgage with the appellee, Keithley to secure King's personal note to Keithley in the sum of $6,000. This fact was not known to Mickelberry until December when he received a notice

General No. 7088 No. 85.

E. R. Mickelberry,

Appellant,

vs. Appeal from Peoria

Arthur Keithley,

Appellee.

Jones, P.J.

This is an appeal from a decree of the Circuit Court of Peoria County dissolving an injunction restraining appellee from selling a certain note for $15,000 secured by a mortgage on real estate and dismissing the bill as to appellee, Keithley, for want of equity.

Appellant, Mickelberry, was the owner of certain real estate in Adams County, Illinois, containing about 555 acres. He contracted to sell the same to John R. King. Subsequently, on March 9, 1920, King contracted to sell it to Edmund H. Dwyer. The deal was not completed for some time thereafter because of objections made by Dwyer's attorney to the title as shown by the abstract. About September 1st, King and Mickelberry entered into an arrangement between themselves, whereby a deed was made by Mickelberry to Dwyer. The latter executed and delivered to King the said note for $15,000 secured by a mortgage on said real estate. The uncontradicted evidence shows that under the arrangement between King and Mickelberry, the said note and mortgage were taken for the use and benefit of both King and Mickelberry and that King's interest in said note amounted to about $1,000 and to a remaining interest belonged to Mickelberry. The note and mortgage were left in King's custody under a declaration by him that he would dispose of the same to the Masonic Lodge in Peoria for cash and retain from the proceeds of the sale the amount due him and pay the remainder to Mickelberry. King endeavored to make a sale of the note and mortgage to the said Lodge but his efforts were not successful. Later King deposited the note and mortgage with the appellee, Keithley, to secure King's personal note to Keithley in the sum of $6,000. This fact was not known to Mickelberry until December when he received a notice

that Keithley would sell the note and mortgage at public sale to satisfy the King note. Mickelberry thereupon filed the bill in this case. The decree ordered King to pay the sum of $14,172.71 to Mickelberry as the amount due Mickelberry on said note. King makes no complaint against such decree. The appeal involves only the action of the chancellor in dissolving the injunction and dismissing the bill as to Keithley.

The conduct of King in transferring the note and mortgage to Keithley to secure King's note for $6,000 was unauthorized. Under Section 59 of our Negotiable Instrument law, a holder, is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. Section 52 of said Act defines "a holder in due course" to be one who has taken the instrument under the following conditions: 1. that the instrument is complete and regular upon its face; 2. that he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact; 3. that he took it in good faith and for value; 4. that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the persons negotiating it. It is claimed by the appellant that Keithley had notice of King's defective title at the time the note and mortgage were transferred to him and that such transfer is therefore subject to the equities of appellant. A defective title having been shown in King, the burden is upon Keithley to prove that he acquired the title as a holder in due course, that is to say, that he took the note in good faith and for value and that at the time it was negotiated to him he had no notice of any defects in King's title to the instrument.

Section 56 of the Negotiable Instruments Law provides that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or

that Keithley could sell the note and mortgage at public sale to satisfy the King note. Mickelberry thereupon filed the bill in this case. The decree ordered King to pay the sum of $14,172.71 to Mickelberry as the amount due Mickelberry on said note. King makes no complaint against such decree. The appeal involves only the action of the chancellor in dissolving the injunction and dismissing the bill as to Keithley.

The conduct of King in transferring the note and mortgage to Keithley to secure King's note for $5,000 was unauthorized. Under Section 52 of our Negotiable Instrument law, a holder, is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. Section 52 of said Act defines "a holder in due course" to be one who has taken the instrument under the following conditions: 1. that the instrument is complete and regular upon its face; 2. that he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact; 3. that he took it in good faith and for value; 4. that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the persons negotiating it. It is claimed by the appellant that Keithley had notice of King's defective title at the time the note and mortgage were transferred to him and that such transfer is therefore subject to the equities of appellant. A defective title having been shown in King, the burden is upon Keithley to prove that he acquired the title as a holder in due course, that is to say, that he took the note in good faith and for value and that at the time it was negotiated to him he had no notice of any defects in King's title to the instrument. Section 58 of the Negotiable Instruments law provides that to constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or

defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The material facts in evidence from which it is contended that Keithley had notice of King's defective title are as follows:- Both King and Keithley are practicing attorneys at law in Peoria and for something like fifteen years had carried on business dealings with each other. At various times King was indebted to Keithley. He also acted as Keithley's attorney in certain matters of litigation. At the time the instruments in question were negotiated to Keithley, King was employed by him in the collection of a certificate of deposit issued by a St. Louis Bank and he was also acting as an attorney for Keithley in litigation then pending in Woodford County, Illinois. King informed Keithley that he had contracted to buy the Adams County land from Mickelberry and had turned the deal to Dwyer at a profit to himself but that he needed $4,000 or $5,000 in cash to consummate it and offered to give Keithley a note for $6,000 secured by the Dwyer note and mortgage as collateral. Just how the sum of $6,000 was arrived at as being the amount needed by King is not very clear but it included a transfer to King of the said certificate of deposit, certain items of indebtedness then existing between King and Keithley and also some cash. A careful examination of all the evidence in this case utterly fails to show that Keithley had actual knowledge of King's defective title to the instruments negotiated to him or knowledge of such facts that his action in taking the instruments from King amounted to bad faith. We, therefore, hold that Keithley was a holder of the instruments in due course. This view is supported by Justice vs. Stonecipher, 267 Ill. 448.

Counsel for appellant contend that where a note and security are transferred together and the security is non negotiable because of its provisions or because of the law, the purchaser takes the same subject to all defenses which might be interposed to a chose in action. C.D.V. Ry. Co. vs. Lowenthal, 93 Ill. 433 and other cases are cited in support of that position. These authorities can not be

defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

The material facts in evidence from which it is contended that Keithley had notice of King's defective title are as follows:- Both King and Keithley are practicing attorneys at law in Peoria and for something like fifteen years had carried on business dealings with each other. At various times King was indebted to Keithley. He also acted as Keithley's attorney in certain matters of litigation. At the time the instruments in question were negotiated to Keithley, King was employed by him in the collection of a certificate of deposit issued by a St. Louis Bank and he was also acting as an attorney for Keithley in litigation then pending in Woodford County, Illinois. King informed Keithley that he had contracted to buy the Adams County land from Mickelberry and had turned the deal to Dwyer at a profit to himself but that he needed $4,000 or $5,000 in cash to consummate it and offered to give Keithley a note for $5,000 secured by the Dwyer note and mortgage as collateral. Just how the sum of $5,000 was arrived at as being the amount needed by King is not very clear but it included a transfer to King of the said certificate of deposit, certain items of indebtedness then existing between King and Keithley and also some cash. A careful examination of all the evidence in this case utterly fails to show that Keithley had actual knowledge of King's defective title to the instruments negotiated to him or knowledge of such facts that his action in taking the instruments from King amounted to bad faith. We, therefore, hold that Keithley was a holder of the instruments in due course. This view is supported by Justice vs. Stonecipher, 287 Ill. 448.

Counsel for appellant contend that where a note and security are transferred together and the security is not negotiable because of its provisions or because of the law, the purchaser takes the same subject to all defenses which might be interposed to a chose in action. C.D.V. Ry. Co. vs. Lowenthal, 83 Ill. 433 and other cases are cited in support of that position. These authorities can not be

invoked in this case. We have held that appellee is the owner of the note in due course and it would be inequitable to apply such a rule, if it exists, when appellant knowingly allowed the note and mortgage to be taken in King's name and surrounded him with every indicia of ownership.

While we think the general conclusions of the chancellor are correct, we are constrained to hold that the decree is erroneous in that it does not grant the relief warranted by the findings contained in the decree. Keithley does not claim to be the owner of the Dwyer note and mortgage, but admits he holds them merely as a pledge to secure the payment of the King note for $6,000. It, therefore, necessarily follows that Mickelberry is entitled to redeem the instruments from Keithley by paying the amount due on the King note or in the event of his failure to so redeem, then that the said instruments may be sold to satisfy the amount due Keithley on the King note. All proceeds of such sale over and above the amount due Keithley on the King note shall be applied to the payment of the amount decreed to be due from King to Mickelberry. It appears from the evidence that the Dwyer note is worth its face value. In the event of a redemption by said Mickelberry, he shall credit King with the difference between the amount due on said mortgage note at the time of redemption and the amount paid Keithley to effect such redemption.

The decree of the circuit court is therefore reversed and remanded with directions to the chancellor to modify the same by granting appellant thirty days time after the date of the entry of such modified decree, in which he may redeem the said note and mortgage from Keithley by paying to the latter, the amount due on the said note of King for $6,000. The said modified decree shall also provide that in the event appellant does not redeem as aforesaid within the time herein allowed to do so, then that the said note and mortgage will be sold at public vendue upon such notice and by such person as the chancellor shall in said modified decree direct and the proceeds from such sale shall be brought into the circuit court where it shall be distributed among the respective parties in interest and in

involved in this case. We have held that appellee is the owner of the note in due course and it would be impugnable to apply such a rule, if it exists, when appellant knowingly allowed the note and mortgage to be taken in King's name and surrounded him with every indicia of ownership.

While we think the general conclusions of the chancellor are correct, we are constrained to hold that the decree is erroneous in that it does not grant the relief warranted by the findings contained in the decree. Keithley does not claim to be the owner of the Dwyer note and mortgage, but admits he holds them merely as a pledge to secure the payment of the King note for $6,000. It, therefore, necessarily follows that Mickelberry is entitled to redeem the instruments from Keithley by paying the amount due on the King note or in the event of his failure to so redeem, then that the said instruments may be sold to satisfy the amount due Keithley on the King note. All proceeds of such sale over and above the amount due Keithley on the King note shall be applied to the payment of the amount decreed to be due from King to Mickelberry. It appears from the evidence that the Dwyer note is worth its face value. In the event of a redemption by said Mickelberry, he shall credit King with the difference between the amount due on said mortgage note at the time of redemption and the amount paid Keithley to effect such redemption.

The decree of the circuit court is therefore reversed and remanded with directions to the chancellor to modify the same by granting appellant thirty days time after the date of the entry of such modified decree, in which he may redeem the said note and mortgage from Keithley by paying to the latter, the amount due on the said note of King for $6,000. The said modified decree shall also provide that in the event appellant does not redeem as aforesaid within the time herein allowed to do so, then that the said note and mortgage will be sold at public vendue upon such notice and by such person as the chancellor shall in said modified decree direct and the proceeds from such sale shall be brought into the circuit court where it shall be distributed among the respective parties in interest and in

accordance with the views hereinbefore expressed. It is further ordered that the costs of this appeal be adjudged against appellee, Keithley.

Reversed and remanded with directions.

accordance with the views hereinbefore expressed. It is further ordered that the costs of this appeal be adjudged against appellee.

Keithley.

Reversed and remanded with directions.

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of December in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

(2608A)

7071

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 2141

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN A TERM OF THE APPELLATE COURT,

begun and held at Springfield, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the second District of the State of Illinois:

Present--The Hon. EDWARD E. DUNN, Presiding Justice.
Hon. AUGUSTUS N. HARKER, Justice.
Hon. THOMAS M. JEFF, Justice.
JOHN E. JOHNSON, Clerk.
CURT C. ATWOOD, Sheriff.

BE IT REMEMBERED, that after [illegible]
[illegible]
Sheriff's Office [illegible]
following [illegible]

General No. 7071 No. 25

Fred J. Steurer, Appellant,

vs.

Elgin and Belvidere Electric, Company,
Appellee.

Appeal Circuit Court of Boone County.

Jones, P. J.

The appellee is an electric railway company possessing and operating a line running through Garden Prairie, an unincorporated village. The tracks of said Company run east and west through said village and intersect a public highway which runs north and south. The appellant was on December 11, 1917, riding in a Ford automobile operated by his son. The automobile had been stopped in front of a store about 116 feet south of appellee's tracks. It was then started and while appellant was attempting to cross said railway tracks a collision occurred wherein appellant received certain physical injuries and his car was damaged. The declaration charges the appellee with general negligence in operating its electric car at and before the time of the collision, and it avers that at such times appellant was in the exercise of due care and caution for his own safety.

This case has been tried by three different juries and has been in this court once before on appeal. Stuerer vs. E. & B. E. Co. 220 Ill. App. 546. The first trial resulted in a verdict in favor of appellant for $500. This verdict was set aside and a new trial awarded by the trial court. The second trial resulted in a verdict in favor of appellant for $550. An appeal by the railway company resulted in a reversal of the judgment entered upon said verdict. Because of an erroneous instruction the case was remanded and again tried. The jury in the last trial found the issues in favor of the defendant, the appellee here.

Appellant urges that the case should be reversed and remanded,

General No. 7071 No. 20

Fred J. Stewart, Appellant,

vs.

Origin and Bellaire Electric, Company,
Appellee.

Appeal Circuit Court of Boone County.

Jones, J. J.

The appellee is an electric railway company operating and operating a line running through Boone County, and authorized to utilize. The tracks of said company are laid over through said utilize and intersect a public highway running north and south. The appellant was on December 1, 1917, riding in a Ford automobile conducted by him. The automobile had been stopped in front of a store building to take on a passenger. It was then parked on a siding and [illegible] to cross said railway track, [illegible] and received part in physical injuries [illegible]. The declaration charges the operators with negligence in operating the electric car [illegible] and it avers that [illegible] due care and caution [illegible].

This case [illegible] been in this court [illegible] 20. 320 Ill. App. 640. The first [illegible] favor of [illegible] new trial [illegible] in a verdict in favor of appellant [illegible] railway company [illegible] was remanded and again tried. [illegible] verdict in favor of the defendant. [illegible]

Appellant argues that the [illegible]

first, because the court improperly excluded certain evidence offered on behalf of appellant; second, the court improperly gave instructions 7, 8, 9, 10 and 11 on behalf of appellee; third, the court improperly refused instruction No. 1 tendered on behalf of appellant, and, fourth, the verdict and judgment is contrary to the manifest weight of evidence.

The seventh instruction given on behalf of appellee told the jury that "the exercise of ordinary care, caution and prudence for ones own safety or to avoid being damaged or injuried, such as is required in this case is the exercise of that care which every person of common prudence bestows upon his own affairs or concerns. And the ordinary care and prudence which reason and law require a person to exercise for his own safety and to avoid being injured, must be proportionate to the danger, if any, and exercised with reference to the situation and position in which the person finds himself. And if the jury believe from the evidence that the plaintiff by the exercise of such degree of care on his own part at the time of and immediately before the injury would have avoided or escaped the injury and if the jury further believe from the evidence that he and his said son did not use such degree of care, then he can not recover in this case and the verdict should be for the defendant." Complaint is made of this instruction because it does not require that the care which must be exercised shall be proportionate to the known danger. It is true as an abstract proposition of law that the danger as to which care must be exercised is either a known danger or danger which might reasonably be expected under the circumstances of the particular case. Nevertheless, it is difficult for us to understand how the jury could have been any wise misled by this instruction. Railroad tracks and railroad crossings are places of known danger, the danger always being from the approach of a car or train

first, because the court improperly excluded certain evidence offered on behalf of appellant; second, the court improperly gave instructions 7, 8, 9, 10 and 11 on behalf of appellee; third, the court improperly refused instruction No. 1 tendered on behalf of appellant, and fourth, the verdict and judgment is contrary to the manifest weight of evidence.

The seventh instruction given on behalf of appellee told the jury that "the exercise of ordinary care, caution and prudence for once own safety or to avoid being damaged or injured, such as is required in this case is the exercise of that care which every person of common prudence bestows upon his own affairs or concerns. And the ordinary care and prudence which reason and law require a person to exercise for his own safety and to avoid being injured, must be proportionate to the danger, if any, and exercised with reference to the situation and position in which the person finds himself. And if the jury believe from the evidence that the plaintiff by the exercise of such degree of care on his own part at the time of and immediately before the injury would have avoided or escaped the injury, and if the jury further believe from the evidence that he and his said son did not use such degree of care, then he can not recover in this case and the verdict should be for the defendant." Complaint is made of this instruction because it does not require that the care which must be exercised shall be proportionate to the known danger. It is true as an abstract proposition of law that the degree of care which care must be exercised in order a known danger or danger which might reasonably be anticipated under the circumstances of the particular case. Nevertheless, it is difficult for us to make it out how the jury could have been any wise misled by this instruction. Railroad tracks and railroad crossings are places of known danger, the danger arising from the approach of a car [illegible]

train. Such approach of the car or train may be attended by obvious and perceptible signals or it may not be so attended. But whatever the circumstances are, it is established not only by the law of the State but by common knowledge that grade crossings are places of known danger. (Chicago & N. W. Ry. vs Hatch 79 Ill. 137; I. C. R. R. vs. Baches 55 Ill. 379; C. M. & St. P. Rys vs. Halsey 133 Ill. 248; Chicago Terminal etc. Co. vs. Helberg, Admstr. 124 Ill. App. 113). It was impossible for the jury to gather any other meaning from the instruction than that it was necessary for the appellant to exercise ordinary care in avoiding being injured by appellee's approaching car. Instructions must always be considered in the light of the evidence and the subject matter of the law suit. (Atchison vs. McKinie 233 Ill. 106) As applied in this particular case to the evidence adduced in it, the said instruction was not erroneous and was not prejudicial to appellant's case. The objections to appellee's instructions 8, 9, 10 and 11 are very much the same as that made to the 7th instruction. The court fully instructed the jury as to the meaning of the term "ordinary care" in the fourth instruction given on behalf of appellant and we see no lack of harmony in the use of the term as it is employed in the various instuctions given by the court.

It is contended by counsel for appellant that appellee's tenth instruction assumes megligence on the part of appellant. Standing alone, this instruction might possibly be open to the attack made upon it, but in view of all of the instructions given in the case, no harm was done appellant by the inartful language employed in this instruction. Instructions are to be read and considered as a series and when so considerdd, if the law has been fairly stated as a whole, it will be held that the jury has been correctly informed as to the law applicable to the case.

train. Such approach of the car or train may be attended by obvious and perceptible signals or it may not be so attended. But whatever the circumstances are, it is established not only by the law of the state but by common knowledge that grade crossings are places of known danger. (Chicago & N. W. Ry. Co. v. Batch 79 Ill. 187; I. C. R. R. Co. v. Hayden 55 Ill. 379; C. M. & St. P. Ry. v. Haley 133 Ill. 248; Chicago Terminal etc. Co. v. Halberg, Admstr. 164 Ill. App. 119). It was impossible for the jury to gather any other meaning from the instruction than that it was necessary for the appellant to exercise ordinary care in avoiding being injured by appellee's approaching car. Instructions must always be considered in the light of the evidence and the subject matter of the law suit. (Aurora v. Hoffman 233 Ill. 156) As applied in this criminal case to the evidence adduced in it, the said instruction was not erroneous and was not prejudicial to appellant's case. The objections to appellee's instructions 8, 9, 10 and 11 are very much the same as that made to the 7th instruction. The court fully instructed the jury as to the meaning of the term "ordinary care" in the fourth instruction given on behalf of appellant and we see no loss of harmony in the use of the term as it is employed in the various instructions given by the court.

It is contended by counsel for appellant that appellee's tenth instruction assumes a duty on the part of appellant. Standing alone, this instruction might possibly be open to the attack made upon it, but in view of the instructions given in the case, it does not appear that the jury was misled or confused by the employment in this instruction. Instructions should be considered as a series and each as a whole, if the law has been fairly stated as a whole, it will be found that the jury has been correctly instructed as to the law applicable to the case.

(Lourence vs. Goodwin 170 Ill. 309; American Car Company vs. Hill [redacted]. 226 Ill. 227)

There is no error in the action of the court in connection with appellant's refused instruction No. 1. The same instruction in substance was contained in the first given instruction asked by appellant,

After a careful examination of the record in this case, we are of the view that the court did not commit any error in its ruling upon the admissibility of evidence or in the giving or refusal of instructions. We can not say that the verdict and judgment are against the manifest weight of the evidence. It would certainly appear that upon the third trial of the cause, all of the available facts in support of the contentions of the respective parties would be produced. Whether or not the injuries of were caused by the negligent operation of appellee's car or by the lack of ordinary care on the part of appellant, or from both, was fairly submitted to the jury and under the circumstances we can not disturb the jury's findings. The judgment is affirmed.

Judgment affirmed.

(Longmore vs. Goodwin 170 Ill. 309; American Car Company v. [illegible] 206 Ill. 227)

There is no error in the action of the court in connection with appellant's refused instruction No. 1. The same instruction in substance was contained in the first given instruction asked by appellant.

After a careful examination of the record in this case, we are of the view that the court did not commit any error in its ruling upon the admissibility of evidence or in the giving or refusal of instructions. We can not say that the verdict and judgment are against the manifest weight of the evidence. It would certainly appear that upon the third trial of the cause, all of the available facts in keep out of the controversy of the respective parties would be produced. Whether or not the injuries of were caused by the negligent operation of appellee's car or by the lack of ordinary care on the part of appellant, or from both, was fairly submitted to the jury and under the circumstances we can not disturb the jury's findings. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7075 No. 38

Sinclair Refining Company,

Appellant,

vs. Appeal from Lake

Joseph Pester,

Appellee

Jones, P.J.

The appellant brought a suit in assumpsit against appellee for the recovery of a balance alleged to be due it from the appellee on account of merchandise sold and delivered. The cause was tried before a jury and a verdict was rendered in favor of the defendant. Judgment was entered thereon in bar of the action and against the plaintiff for costs. This cause is now here on appeal.

Appellee was engaged in selling oils, and he purchased the same from appellant. Deliveries were made by drivers of appellant. On such occasions, if the appellee paid cash upon delivery for the oil, a receipt for such payment was given him. When he did not pay cash for the oil, a ticket was made out in triplicate showing the quantity of oil delivered, the price and the date. This ticket was then signed by appellee. Being unable to read or write he made his signature by mark. The testimony tends strongly to show that he generally failed to pay cash on delivery but at the time of the next delivery he would make a payment for the whole or some part of the oil delivered to him on former occasions. This practice was not invariably followed out. Whenever he made payments on prior deliveries he was given a receipt and he testified that these receipts were then hung upon a hook in his shop.

On the trial of the cause appellant introduced in evidence 44 tickets, duplicates of which it was claimed were given to appellee at the time of the delivery of oil which was not paid for on such occasions. It is nowhere disputed that the oil mentioned in such tickets was delivered to appellee nor is it disputed that at the

General No. 7075 No. 85

Sinclair Refining Company,

Appellant,

vs. Appeal from Lake

Joseph Pester,

Appellee

Jones, P.J.

The appellant brought a suit in assumpsit against appellee for the recovery of a balance alleged to be due it from the appellee on account of merchandise sold and delivered. The cause was tried before a jury and a verdict was rendered in favor of the defendant. Judgment was entered thereon in bar of the action and that the plaintiff for costs. This cause is now here on appeal.

Appellee was engaged in selling oil, and he purchased the same from appellant. Deliveries were made by drivers of appellant. On such occasions, if the appellee paid cash upon delivery for the oil, a receipt for such payment was given him. When he did not pay cash for the oil, a ticket was made out in triplicate showing the quantity of oil delivered, the price and the date. This ticket was then signed by appellee. Being unable to read or write he made his signature by mark. The testimony varies strongly to show that he generally failed to pay cash on delivery but at the time of the next delivery he would make a payment for the whole or some part of the oil delivered to him on former occasions. This practice was not invariably followed out. Whenever a cash payment on prior deliveries he was given a receipt and he testified that these receipts were then hung upon a hook in his shop.

On the trial of the cause appellant introduced in evidence 44 tickets, duplicates of which it was claimed were given to appellee at the time of the delivery of oil which was not paid for on such occasions. It is nowhere disputed that the oil mentioned in each ticket was delivered to appellee nor is it disputed that at the

time such deliveries were made the oil was not paid for. Appellee insists that payments fully covering such deliveries were afterwards made. However, he produced no receipts. He kept no books and evidently relied altogether upon his memory.

The court gave the following instruction at the request of the appellee "If you believe that the defendant paid for all goods sold and delivered to him by the plaintiff in this case, at the time subsequent deliveries were made by the plaintiff, and that the agents of the plaintiff were duly authorized to collect unpaid balances from the defendant, and that the said agents did keep and retain some of the money so collected, or did sell and receive money for goods which were to have been delivered to the defendant, and which, accounts of the company show were delivered to the defendant, then the defendant is not liable for the moneys so kept and received, if any, by the agent or agents of the plaintiff." There was no basis whatever for the giving of this instruction. There is not a particle of evidence on the case even tending to show that the drivers who delivered the oil kept and retained any of the money they collected from appellee nor that any of them sold to others any of the oils intended for delivery to appellee. The prejudice likely to result from the giving of such instruction is so patent and obvious it needs no discussion. It was error for the court to give an instruction not predicated on the evidence. (Boldenwick vs. Cahill, 187 Ill. 218; Harvey vs. McQuirk, 158 Ill. App. 50)

This cause is reversed and remanded to the trial court for a new trial.

Reversed and remanded.

time such deliveries were made the oil was not paid for. Appellee insists that payments fully covering such deliveries were afterwards made. However, he produced no receipts. He kept no books and evidently relied altogether upon his memory.

The court gave the following instruction at the request of the appellee "If you believe that the defendant paid for all goods sold and delivered to him by the plaintiff in this case, at the time subsequent deliveries were made by the plaintiff, and that the agents of the plaintiff were duly authorized to collect unpaid balances from the defendant; and that the said agents did keep and retain some of the money so collected, or did sell and receive money for goods which were to have been delivered to the defendant, and which, accounts of the company show were delivered to the defendant, then the defendant is not liable for the money so kept and received, if any, by the agent or agents of the plaintiff." There was no basis whatever for the giving of this instruction. There is not a particle of evidence on the case even tending to show that the drivers who delivered the oil kept and retained any of the money they collected from appellee nor that any of them sold to others any of the oils intended for delivery to appellee. The prejudice likely to result from the giving of such instruction is so patent and obvious it needs no discussion. It was error for the court to give an instruction not predicated on the evidence. (Goldenwick vs. Cahill, 187 Ill. 318; Harvey vs. McGuirk, 158 Ill. App. 50)

This cause is reversed and remanded to the trial court for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

7079

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 Ill. App. 143

BE IT REMEMBERED, that afterwards, to-wit: on 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

begun and held at Ottawa, on Tuesday, [illegible]

in the year of our Lord one thousand [illegible]

twenty-two, within and for the [illegible]

of Illinois:

Present--The Hon. EDWARD [illegible]

Hon. AUGUSTUS N. PARTON, [illegible]

Hon. THOMAS M. [illegible]

AUGUST [illegible]

CURT S. AYERS, [illegible]

BE IT REMEMBERED, [illegible]

Clerk's office [illegible]

following, to-wit:

General No. 7079 No. 31

Elias Feinstein, Appellee,

vs.

Sameul Schwartz, Appellant.

Appeal from Circuit Court of Lake County.

Jones, P. J.

This is an appeal from a judgment in favor of appellee, Feinstein and against appellant, Schwartz for $1,607.17 and costs recovered in an action of assumpsit. Appellant was a dealer in certain soft drinks made by Pabst Brewing Company. Appellee was a customer of appellant and purchased large quantities of Pablo. He was entitled to a rebate or credit for all empty cases and bottles which he returned. The controversy between the parties to this suit involves only such rebate or credit. Before entering upon trial it was stipulated between the parties that the account between them showed a balance against appellee amounting to $6,042.38, subject, however, to whatever offset or credit he is entitled to because of returned cases and empty bottles.

The finding of the jury that there was $1,607.17 due Feinstein after charging him with the said above mentioned balance seems to be justified by the evidence.

The point seriously insisted upon for a reversal of this case is that the court refused to give the following instruction to the jury: "You are the sole judges of the weight of the evidence and of the credibility of the witnesses and if you believe from the evidence that any witness has wilfully sworn falsely as to any material fact in this case, you may unless the same is corroborated by other credible evidence or fact and circumstances in evidence, disregard the whole or any part of the testimony of such witness, and in passing on the credibility of any witness or the weight to be given to his testimony, you may consider his manner and conduct upon the stand, as means of knowledge, the relationship of the

General No. 7079 No. 31

Elias Weinstein, Appellee,

vs.

Samuel Schwartz, Appellant.

Appeal from Circuit Court of Cook County.

Jones, P. J.

This is an appeal from a judgment in favor of appellee, Weinstein and against appellant, Schwartz for $1,[illegible] and costs recovered in an action of assumpsit. As plaintiff was a dealer in certain soft drinks made by defendant [illegible] was a customer of appellant and purchased [illegible] quantities of "pop." [illegible] was entitled to a rebate [illegible] and bottles which he returned. The [illegible] between the parties to this suit [illegible] entering upon trial [illegible] account between the [illegible] to $6,046.55, subject, [illegible] is entitled to because of returned [illegible].

The finding of the jury [illegible] after charging him with the [illegible] be justified by the evidence.

The point strongly insisted [illegible] is that the court refused to [illegible] the jury: "You are the [illegible] and of the credibility of [illegible] the evidence that was [illegible] material fact in this case, you may [illegible] by other credible evidence or fact and circumstance [illegible] disregard the whole or any part of the [illegible] and in passing on the credibility of any [illegible] be given to his testimony, you may [illegible] upon the stand, his means of knowledge, the reasonableness of his

party, if any, and the interest that he may have in the result of the case."

We held in Conlon vs. C. G. W. Ry. Co. 139 App. 555 that where some of the statements of a witness on direct and cross examinations are not consistent and harmonious with each other, it is error to refuse an instruction advising the jury that if they believe any witness has wilfully and knowingly sworn falsely to any fact material to the issues in the case, they are at liberty to disregard the entire testimony of such witness, except in so far as it may have been corroborated by other credible evidence or by facts and circumstances proven on the trial. We see no reason to depart from the holding in that case and if the instruction asked for in the Conlon case had been tendered to the court in the instant case, it no doubt would have been given. But an examination of the instruction now complained of will disclose that it is loosely constructed and quite difficult of understanding. Whether the jury understood that they might disregard false testimony only when it was not corroborated by other credible evidence or facts and circumstances in evidence, is not at all clear. It is possible to make the instruction clear by a transposition of certain of the language employed. But the court is not required to re-draft or re-construct instructions. We are mindful of the serious and exacting task of the trial judge in examining and passing upon instructions at the close of a trial. It ought not to be expected of him that he will take the time to remodel ambiguous instructions in order to put them in proper shape to be given to the jury.

There is another mistake in this instruction which is obvious to everyone in the legal profession but which might not be apparent to a layman, and therefore the meaning of the instruction could not be appreciated by the jury. The instruction concludes as follows,

party, if any, and the interest that he may have in the result of the case."

We held in Denton vs. C. & N. Ry. Co. 102 App. 558 that where some of the statements of a witness on direct and cross examinations are not contradicted and inconsistent with each other, it is error to refuse an instruction advising the jury that if they believe any witness has wilfully and knowingly sworn falsely to any fact material to the issue in the case, they are at liberty to disregard the entire testimony of such witness, except in so far as it may have been corroborated by other credible evidence or by facts and circumstances [illegible] in the trial. We see no reason to depart from the foregoing [illegible] and if the instruction asked for in the Denton case had been tendered to the court in the instant case, it would [illegible] given. But an examination of the instruction [illegible] shows that it is loosely constructed and quite [illegible] misleading. Whether the jury understood or that they [illegible] testimony only when it was not corroborated [illegible] or facts and circumstances in evidence, [illegible]. It is sufficient to make the instruction [illegible] in of the language used [illegible] re-draft or re-construct instruction. [illegible] and executing task of the trial judge [illegible] instructions of the court [illegible] of him that he will take the [illegible] instructions in order to set them [illegible] to giving to the jury.

There is another [illegible] which is [illegible] to everyone in the legal profession but which may not be apparent to a layman, and therefore the meaning of the instruction could not be appreciated by the jury. The instruction concludes as follows,

"You may consider his manner and conduct upon the stand as means of knowledge"etc. Undoubtedly the use of the word "as" was a typographical error and the word intended to be used was "his", but the jury could not know this, and the instruction standing as it does is unintelligible. The court was justified in refusing it. The judgment of the court is therefore affirmed.

Judgment affirmed.

"You may consider his manner and conduct upon the stand as means of knowledge" etc. Undoubtedly the use of the word "as" was a typographical error and the word intended to be used was "has", but the jury could not know this, and the instruction standing as it does is unintelligible. The court was justified in refusing it. The judgment of the court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov., in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

7082 (2661)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

George W. Brown, Appellant,

vs. Appeal from Stark.

Robert Conover, Appellee.

Jones, P. J.

Brown sued Conover in the circuit court of Stark County to recover commissions for the sale of real estate and filed a declaration containing three special counts and the common counts. The special counts alleged that Conover owned a farm in Marshall County and employed Brown to procure a purchaser therefor and arranged to pay him a commission for procuring such purchaser and that Brown did procure a purchaser to whom Conover sold the land, and that Conover had not paid him the agreed commission. Conover filed a plea of non-assumpsit. The sause was tried by a jury. At the end of all the evidence plaintiff asked the court to instruct the jury to find for him in the sum of $500.00. This instruction the court refused. The jury found for defendant. A motion for a new trial by plaintiff was denied. Defendant had judgment and plantiff appeals.

It was not definitely agreed at first what the commission should be, but it was finally agreed that it should be $500. Brown interested one Lyon in the premises and showed the farm to him and introduced him to Conover and afterwards the parties all went to Henry ~~and~~ Lyon and Conover afterwards went to a bank and the contract was there prepared and executed. It was not, however, a contract for the unqualified sale and purchase of the farm. The contract was dated July 31, 1919. The price named in the contract was $60,000, of which sum $2,000 was paid down, $15,000 was to be paid on March first, 1920, and on that day the deferred payments were to be secured by a first mortgage on the land. Said contract contained also the following provision: "The party of the first part hereby acknowledges a check from the party of the second part for $2000.00, the same when paid being accepted as a prepayment on the amount due March 1st, 1920, but in event of the party of the second part failing in his agreement, the said sum of $2000.00 shall be

George W. Brown, Appellant,

vs. Appeal from Stark.

Robert Conover, Appellee.

Jones, P. J.

Brown and Conover in the circuit court of Stark County to recover commissions for the sale of real estate and filed a declaration containing three special counts and the common counts. The special counts alleged that Conover owned a farm in Marshall County and employed Brown to procure a purchaser therefor and arranged to pay him a commission for procuring such purchaser and that Brown did procure a purchaser to whom Conover sold the land, and that Conover had not paid him the agreed commission. Conover filed a plea of non-assumpsit. The cause was tried by a jury. At the end of all the evidence plaintiff asked the court to instruct the jury to find for him in the sum of $500.00. This instruction the court refused. The jury found for defendant. A motion for a new trial by plaintiff was denied. Defendant had judgment and plaintiff appeals.

It was not definitely agreed at first what the commission should be, but it was finally agreed that it should be $500. Brown interested one Lyon in the premises and showed the farm to him and introduced him to Conover and afterwards the parties all went to Henry ~~and~~ Lyon and Conover afterwards went to a bank and the contract was there prepared and executed. It was not, however, a contract for the unqualified sale and purchase of the farm. The contract was dated July 31, 1919. The price named in the contract was $60,000, of which sum $4,000 was paid down, $15,000 was to be paid on March first, 1920, and on that day the deferred payments were to be secured by a first mortgage on the land. Said contract contained also the following provision: "The party of the first part hereby acknowledges a check from the party of the second part for $2000.00, the same when paid being accepted as a prepayment on the amount due March 1st, 1920, but in event of the party of the second part failing in his agreement, the said sum of $2000.00 shall be

retained by the party of the first part, as loss or damage to him on account of such failure, and this agreement shall then be considered otherwise null and void." This in substance like the contract involved in Lawrence v. Rhodes, 188 Ill. 96. It was held that this was only an option contract and that the agent in that case did not effect a sale by procuring a purchaser who entered into such a contract only. It was there said; "If he saw fit to forfeit the $1500, as he had the option to do, no sale was effected and no compensation earned by appellee. In order for appellee to comply with his undertaking so as to entitle him to compensation he was bound to produce a purchaser who was willing to enter into a valid, binding and enforceable contract for the purchase of the premises, and not one who was only willing to take an option thereon." This case was cited with approval in Bunn v. Keach, 214 Ill. 259. If when March 1, 1920, came, Lyon had made the payments and given the notes and security specified in the contract, Brown's commission would then have been earned, but before that time came Lyon forfeited the contract. Conover still owns the land. He has the $2,000 as the money which he was to retain as his damages if Lyon did not exercise his option to buy. But in the language of Lawrence v. Rhodes, supra, no sale was effected and no compensation was earned by the plaintiff.

Brown argues that it was a fraud for Conover to have entered into a contract which contained this option clause. The proof does not support this contention. Brown went away from the bank where Conover and Lyon were discussing the matter for a long time. What was there said is not in proof. There is no proof that Lyon would have signed the contract with this option feature left out. We must assume that Conover obtained as favorable a contract as Lyon would make.

Some criticism is made of the ruling of the court on instructions, but as the undisputed evidence is that Brown is not entitled to recover, it is unnecessary to discuss those rulings.

The judgment is affirmed.

restored by the party of the first [illegible]
account of such failure, and [illegible]
otherwise null and void." [illegible]
in Lawrence v. [illegible]
action, contract and that the [illegible]
[illegible] a [illegible]
said; "If [illegible] to [illegible]
sale was effected [illegible]
appears to [illegible]
he was bound to [illegible]
building and [illegible]
one who was [illegible]
with [illegible]
[illegible]
in the [illegible]
fore that time [illegible]
land. [illegible]
[illegible]
of [illegible]
[illegible]

[illegible]
a contract which [illegible]
this [illegible]
were discussing the [illegible]
it and, [illegible]
this [illegible]
[illegible]

[illegible]
[illegible]
[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

(26621)

7084

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 5 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7084. No. 34

Clark & Tess, Appellants,

vs. Appeal from Stark.

Chas. P. Dewey, Appellee.

Jones, P. J.

The appelle was the owner of a half section of land in Stark County and in the latter part of the year 1919 he listed the said land with several real estate brokers for sale. Among them were the appellant, Ellsworth Clark and Fred Tess, Jr. who were doing business under the firm name of Clark & Tess. Sometime about the first of the year 1920, the appellant, Clark, endeavored to interest W. D. Dye as a purchaser and took Dye out to the farm to look it over. According to the testimony of Clark, Dye after having examined the farm stated that he would like to buy it but could not close the deal just at that time; and that he would soon have a sale on his farm, after which he would enter into negotiations looking towards the purchase of the farm. Dye denied that he made such statements to Clark but says that he told Clark he was not interested in the farm. The record does not disclose whether or not Dye afterwards had a sale on his farm, but it is apparent that no further negotiations between appellants and Dye were had until the following September. Dye, who is also a real estate broker, claims that prior to this last mentioned date and about the month of July, Dewey listed the farm with him for sale and that he, Dye, afterwards entered into a contract with Dewey whereby Dewey was to sell the land to him. This contract of sale was entered into between Dewey and Dye on October 6th, 1920. Clark testified that Dye told him in September, 1920, that he, Dye, was still interested in the place. Dye, however, says that at that time he told Clark he had bought the place.

After the execution of the contract of October 6, between

General No. 7064. No. 34

Clark & Tose, Appellants,

vs. Appeal from Stark.

Chas. F. Dewey, Appellee.

Jones, J. J.

The appellee was the owner of a [illegible] in Stark County, and in the [illegible] the said land with several [illegible] them were the appellant, Edwin Clark and Fred Tose, [illegible] were doing business under the firm name of Clark & Tose. [illegible] time about the first of the year 1890, the appellant, [illegible] endeavored to interest W. D. Dye in a [illegible] out to the farm to look it over. [illegible] Clark, Dye after having examined the farm stated that he would like to buy it but could not close the deal just at that time; [illegible] that he would soon [illegible] into negotiations looking [illegible] Dye donbedthat he [illegible] he was not interested in [illegible] whether or not Dye [illegible] apparent that [illegible] were had with the [illegible] estate broker, [illegible] and about the [illegible] sale and that he, and [illegible] Dewey were [illegible] of sale was [illegible] Clark testified that Dye [illegible] was still interested in the [illegible] that time he told Clark he had bought the farm.

After the execution of the [illegible]

Dewey and Dye, Dewey sold the land at a profit to himself, to one William H. Hartz, whose attention had already been drawn to the farm by appellants. At the instigation of Dye, a deed was made direct from Dewey to Hartz in order to avoid successive conveyances and to save the cost of revenue stamps, etc.

The price paid for the land by Dye was $76,800. This is a suit for a commission of two per cent. The cause was tried by a jury. A verdict was returned in favor of the defendant, the appellee here, and the cause is before us on appeal.

It is strenuously insisted that the verdict is against the manifest weight of the evidence. It must be conceded that there is much testimony in the case tending to support the contentions of the appellants, but whether or not they were the procuring cause of the sale to Dye was squarely presented to the jury. There was also a very considerable amount of testimony in favor of the contentions of appellee. The jury saw and heard the witnesses. They were in the best possible position to judge of the weight and credit to be given to the testimony of each of them. They found the issues in favor of appellee and whatever may be our impression as to the merits of the relative contentions, we can not say that the finding of the jury was against the manifest weight of the evidence.

It is also urged by the appellants that the court committed reversible error in reference to instructions both given and refused. The first complaint in reference thereto is that the court refused to give the following instruction. "The court further instructs the jury, that if you find from the evidence, that the plaintiffs have proved their case, by the greater weight of all the evidence in the case, then it would be your duty to find a verdict in their favor." Standing alone no criticism can be made of this instruction. However, the court gave an

Dewey and Dye, Dewey sold the land at a profit to himself, to the William H. Hartz, whose attention had already been drawn to the farm by appellants. At the instance of Dye, a deed was made direct from Dewey to Hartz in order to avoid unnecessary conveyance and to save the cost of revenue stamps, etc.

The price paid for the land by Dye was $[illegible],600. This is a suit for a commission of two per cent. The cause was tried by a jury. A verdict was returned in favor of the defendant, the appellee here, and the cause is before us on appeal.

It is strenuously insisted that the verdict is against the manifest weight of the evidence. It must be conceded that there is much testimony in the case tending to support the contentions of the appellants, but whether or not they were the procuring cause of the sale to Dye was squarely presented to the jury. There was also a very considerable amount of testimony in relation to the contentions of appellee. The jury saw and heard the witnesses. They were in the best possible position to judge of the weight and credit to be given to the testimony of each of them. They found the issues in favor of appellee and wherever may be our impression as to the merits of the relative contentions, we do not say that the finding of the jury was against the manifest weight of the evidence.

It is also urged by the appellants that the court committed reversible error in reference to instructions both given and refused. The first complaint in reference thereto is that the court refused to give the following instruction. "The court further instructs the jury, that if you find from the evidence, that the plaintiffs have proved their case, by the greater weight of all the evidence in the case, then you would be your duty to find a verdict in their favor." Standing alone, no criticism can be made of this instruction. However, the court gave an

instruction at the request of appellant in which the jury was told that although the burden is upon plaintiff to prove their case by the greater weight of all the evidence, still, if after hearing all the evidence and instructions of the court, the jury finds that the evidence preponderates in plaintiff's favor, although but slightly, this would be a sufficient preponderance, and the jury should in that event find in favor of the plaintiff. It will be readily observed that all of the elements contained in the refused instruction are found in the given instruction. Therefore, the appellants suffered no injury by the refusal of said instruction.

Complaint is also made because the court modified certain instructions tendered by appellants. The instructions as tendered required the jury to believe from the greater weight of evidence that Dye was procured as a purchaser through the instrumentality of the plaintiffs. The court modified the instruction by requiring that the purchaser be procured through the instrumentality <u>and</u> <u>solicitation</u> of the plaintiffs. We believe the instructions as they were tendered were correct and were not in need of the modifications made. If a purchaser was procured through the instrumentality of the plaintiffs, it matters not whether that instrumentality consisted of solicitation or something else.

Another instruction tendered by plaintiffs (the instructions are not numbered either in the brief or abstract) in addition to being modified as above set out, was further modified by the court and as modified told the jury that if they believe from the greater weight of the evidence that Dewey employed plaintiffs to sell his farm and that they accepted said employment and <u>first</u> solicited Dye to look at the lands and that Dye in consequence of said solicitation, became the purchaser, the plaintiff would be entitled to recover. It is rather hard to tell whether the insertion of the word <u>first</u> makes the instruction mean that the

instruction at the request of appellant in which the jury was told that although the burden is upon plaintiff to prove their case by the greater weight of all the evidence, still, if after hearing all the evidence and instructions of the court, the jury finds that the evidence preponderates in plaintiff's favor, although but slightly, this would be a sufficient preponderance, and the jury should in that event find in favor of the plaintiff. It will be readily observed that all of the elements [illegible] in the refused instruction are found in the given instruction. Therefore, the appellants suffered no injury by the refusal [illegible] said instruction.

Complaint is also made because the court modified certain instructions tendered by appellants. The instructions as tendered required the jury to believe from the greater weight of evidence that Dye was procured as a purchaser through the instrumentality of the plaintiffs. The court modified the instruction by requiring that the purchaser be procured through the instrumentality and solicitation of the plaintiffs. We believe the instructions as they were tendered were proper [illegible] were not in need of the modifications made. If Dye was procured through the instrumentality of the plaintiffs, the matters not whether that instrumentality [illegible] or something else.

Another instruction tendered by plaintiff (the [illegible]) are not mentioned either in the brief [illegible] being modified as above set [illegible], was further modified, the court and as modified told the jury that if they [illegible] the greater weight of the evidence that [illegible] plaintiffs to sell his farm and that they [illegible] and first solicited Dye to look at the lands and [illegible] said solicitation, because the purchaser, the plaintiff [illegible] entitled to recover. It is rather hard to tell whether the insertion of the word first makes the instruction mean that the

jury was to believe that plaintiffs accepted employment and that thereupon and before doing anything else, they solicited Dye, or whether they must believe that Dye was solicited by plaintiff before he was solicited by any other agent of the owner. In this connection it may be said that according to Dye's testimony, his attention was first called to the farm by H. C. Cox, also an agent for the sale of the land. No matter which interpretation may be given, the modification was in our judgment a harmless one and the jury was not mislead by it. After considering the instructions as a series and taking them as a whole, it is impossible to conceive that the jury had any other idea of the question before them than whether or not appellants were the procuring cause in bring about the sale to Dye, so as to entitle them to commissions.

Error is also assigned because of the court's ruling upon admissibility of evidence, It will serve no useful purpose for us to fully set out all the objections made in this regard. It is sufficient to say that there was no substantial error committed by the court. We are of the opinion that the judgment should be affirmed.

Judgment Affirmed.

jury was to believe that plaintiffs accepted the agreement and that thereupon and before doing anything else, they solicited Dye, or whether they must believe that Dye was solicited by plaintiff before he was solicited by any other agent of the owner. In this connection it may be said that according to Dye's testimony, his attention was first called to the farm by E. O. Cox, also an agent for the sale of the land. No matter which interpretation may be given, the modification was in our judgment a meaningless one and the jury was not misled by it. After considering the instructions as a series and taking them as a whole, it is impossible to conceive that the jury had any other idea of the question before them than whether or not appellants were the procuring cause in bring about the sale to Dye, so as to entitle them to commissions.

Error is also assigned because of the court's ruling upon admissibility of evidence. It will serve no useful purpose to go to fully set out all the objections made in this regard. It is sufficient to say that there was no substantial error committed by the court. We are of the opinion that the judgment should be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov., in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

7093 (2643a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. App. 2

BE IT REMEMBERED, that afterwards, to-wit: on Oct. [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7093 No. 40

Lem Noice and Thomas Parker, Appellees,

vs. Appeal from Grundy,

William Welsh, Appellant.

Jones, P. J.

The facts in this case and the law applicable thereto are substantially the same as those involved in the case of Noice and Parker vs. Welsh, the opinion in which case was filed in this court on the 5th day of August, 1922. The judgment here is controlled by our opinion in that case. Therefore, the judgment in this case is affirmed.

Judgment affirmed.

General No. 7053 No. 40

Sam Moice and Thomas Parker, Appellees,

vs. Appeal from Grundy,

William Welsh, Appellant.

Jones, P. J.

The facts in this case and the law applicable thereto are substantially the same as those involved in the case of Moice and Parker vs. Welsh, the opinion in which case was filed in this court on the 5th day of August, 1925. The judgment here is controlled by our opinion in that case. Therefore, the judgment in this case is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson

Clerk of the Appellate Court.

7096 (2644a)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 3

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Etta M. Hartley, appellant,

vs.

Mystic Workers of the World,

appellee.

Appeal from Stark

Jones, P. J. Etta M. Hartley was the beneficiary in a certificate issued by the Mystic Workers of the World to her husband, Arthur G. Hartley, He died and she brought this suit to recover the sum payable by defendant to her under the terms of said certificate. She filed an appropriate declaration upon the certificate. Defendant filed the general issue and two special pleas. The general substance of the special pleas was that the contract between the society and Hartley was evidenced by the constitution and by laws of the society and Hartley's application for membership and by the beneficiary certificate issued by the society. The pleas set up that Hartley agreed to abide by all the laws, rules and regulations of the order, now or hereafter in force, and that his application was the basis of the contract; that the constitution and by laws required the applicant to conform to the laws of the order, then or thereafter in force; that section 53 of the constitution provided that no mortuary benefit should be paid to the beneficiary of any one whose death was caused directly or indirectly in whole or in part as a result of his own wilful act or the violation or attempted violation of any of the laws of the country; that before the death of Hartley said section 53 was amended as section 126, which provided that if a benefit member died through or by his own violation or attempted violation of any criminal law or laws against misdemeanors, then the benefit certificate shall be ipso facto null and void; that said amendment was in full force and effect before and at the time of the death of said Hartley and still is in force and binding on Hartley and his beneficiary; that in his application Hartley agreed that if he died as a result of the violation of the criminal laws of the country, he for his beneficiaries waived all rights or benefits based on the application.

Th

Etta M. Hartley, appellant,

vs.

Appeal from Salem

Myrtle Workers of the World,

appellee.

Jones, P. J. Etta M. Hartley was the beneficiary in a certificate issued by the Myrtle Workers of the World to her husband, [illegible] Hartley. He died and she brought this suit to recover the [illegible] by defendant to her under the terms of said certificate. The filed an appropriate declaration upon the certificate. Defendant filed the general issue and two special pleas. The general sufficiency of the special plans was that the contract between the assured, and [illegible] evidenced by the constitution and by laws of the society [illegible] application for membership [illegible] by the society. The plaintiff [illegible] the laws, rules and regulations of the society, [illegible] and that his application was the basis of the contract [illegible] stitution and by laws [illegible] the order, then or thereafter in force; [illegible] tution providing that no [illegible] iary of any one whose death was caused directly or indirectly [illegible] in part as a result of his own [illegible] violation of any of the laws [illegible] Hartley said section 80 was [illegible] if a benefit member dies through or by the [illegible] violation of any criminal law or [illegible] benefit certificate shall be [illegible] ment was in full force and effect [illegible] said Hartley and still is in full force [illegible] fidelity; that in his application he [illegible] result of the violation of the criminal laws of the [illegible] beneficiaries waived all rights or benefits based on the [illegible]

The pleas further averred that in said County of Stark on December 6,1919, which was the date of death alleged in the declaration, Hartley attempted to and did violate the criminal laws of the State Of Illinois and the laws against misdemeanors and the laws of the country, and did then and there unlawfully assault one Ogburn, with intent then and there to commit a violent injury on the person of saidOgburn and that Ogburn, in defense of his person and to repel said unlawful assault, so about to be committed on him, did then and there strike said Hartley a violent blow on the head with a pitchfork, then and there held in the hands of said Ogburn, thereby then and there inflicting upon the person of said Hartley a dangerous and fatal wound, from which and by reason of which said Hartley afterwards died; and the pleas averred that the death of Hartley was through and by his own violation of the criminal laws and the laws against misdemeanors of the State of Illinois, and by reason thereof the benefit certificate in the declaration mentioned became and is null and void and all benefits of the plaintiff under said certificate were forever barred. Plaintiff demurred to said special pleas. The demurrers were overruled. Plaintiff elected to stand by them. Judgment in bar was entered against plaintiff, and she appeals therefrom.

Appellant contends that in order for the matters set up in said pleas to constitute a defense they should show that the violation of the law was of such a character that Hartley should have anticipated that his death would result as the natural and probable consequence of the unlawful act. We are of the opinion that to so hold would be to write into this contract, provisions which the parties did not embody therein. Certainly, the parties had a right to agree that there should be no liability on this certificate if Hartley's death resulted from his own violation or attempted violation of any criminal law or of any law against misdemeanors. They did make such a contract in terms that were explicit and do not admit of any such construction as is here sought. We are of opinion that the action of the court below is sustained by

The plaintiff further averred that in said County of Stark on December 3, 1919, which was the date of death alleged in the declaration, Hartley attempted to and did violate the criminal laws of the state of Illinois and the laws against miscegenation and the laws of the country, and did then and there unlawfully assault one Ogburn, with intent then and there to commit a violent injury on the person of said Ogburn and that Ogburn, in defense of his person and to repel said unlawful assault, so about to be committed on him, did then and there strike said Hartley a violent blow on the head with a pitchfork, then and there held in the hands of said Ogburn, thereby then and there inflicting upon the person of said Hartley a dangerous and fatal wound, from which and by reason of which said Hartley afterwards died; and the plaintiff averred that the death of Hartley was brought and by his violation of the criminal laws and the laws against miscegenation of the state of Illinois, and by reason thereof the certificate of the isolation monitions be and is null and void and of no effect; the plaintiff under said certificate were forever barred. Plaintiff demurred to said special pleas. The demurrers were overruled. Defendant elected to stand by them. Judgment for defendant was entered against plaintiff, and the appeals therefrom.

Appellant contends that in order [illegible] plaintiff and plaintiff to constitute a defense they should show that the violation of the law was of such a character that Hartley should have [illegible] that his death would result in the natural and probable course of the unlawful act. We are of the opinion that to be held liable [illegible] this contract, provisions which the parties did not specifically [illegible]. Certainly, the parties had a right to agree that there should [illegible] liability on this certificate if death ensued from his own violation or attempted violation of any criminal law or any law against miscegenation. They did make such a contract in [illegible] Appellant and do not admit of any such construction as is here sought. We are of opinion that the action of the court below in sustaining by

Seitzinger v. Modern Woodmen, 204 Ill. 508; Gauger v. American Patriots, 263 Ill. 604, and the decision of this court in Supreme Tent of the Knights of the Maccabees v. Hammers, 81 Ill. App. 560, and by the authoritites cited and discussed in those opinions. It would serve no useful purpose to burden this opinion with a recital of what is decided in these cases. The sum and substance of it all is that the parties had a right to make such a contract and that the contract they made is not susceptible of the construction contended for by appellant.

The judgment is therefore affirmed.

Sattlinger v. Modern Woodmen, 224 Ill. 5[illegible]; Bergen v. American Insurance, 203 Ill. 604, and the decisions of this court in Business Men of the Knights of the Maccabees v. Summers, 91 Ill. 400, 500, and in the numerities cited and discussed in those opinions. It would serve no useful purpose to burden this opinion with a review of what is decided in those cases. The sum and substance of it all is that the defendants had a right to make such a contract and that the contract they made is not susceptible of the construction contended for by appellees.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

R. H denied Jan 4, 1923

7097

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

21664

227 I.A. 615

BE IT REMEMBERED, that afterwards, to-wit: on OCT [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

General No. 7097 No. 43.

Henry Knott, appellant,

vs. Appeal from Winnebago

Frank J. Fry, appellee,

Jones, P.J.

This is an action brought by Henry Knott, appellant, against Frank J. Fry, appellee, to recover for personal injuries sustained by appellant and for damages to his automobile alleged to have resulted from a collision between the car of appellant and that of appellee. A trial was had before a jury which resulted in a verdict and judgment in favor of the defendant, Fry. The only ground urged for the reversal is that the verdict and judgment are against the manifest weight of the evidence.

At about 10:30 o'clock of the morning of January 1st, 1920, Henry Knott in company with his wife, son and daughter-in-law were riding in a five passenger Buick car driven by his said son, Harold. On the front seat by the side of the driver was his wife, Nora Knott, and on the rear seat was the appellant, Henry Knott and his wife, Carrie B. Knott. The appellant was seated on the right hand side. They came from Holcomb and were driving to Rockford. They had reached the outskirts of that City and were proceeding north on Kishwaukee Street which is the main street for north and south travel through Rockford. Eighteenth Avenue crosses Kishwaukee Street at right angles. There are street car tracks running south on Kishwaukee Street to Eighteenth Avenue where they turn west. They are laid a little to the west of the center of Kishwaukee Street and slightly to the south of the center of Eighteenth Avenue. The day was clear and cold. The streets were slippery, being covered with ice. Shallow tracks had been worn in the ice by automobile traffic. Appellant's car was on the right side of Kishwaukee Street and just as it had reached the center of said street intersection or

General No. 7097 No. 43.

Henry Knott, appellant,

vs. Appeal from Winnebago

Frank J. Fry, appellee.

Jones, P.J.

This is an action brought by Henry Knott, appellant, against Frank J. Fry, appellee, to recover for personal injuries sustained by appellant and for damage to his automobile alleged to have resulted from a collision between the car of appellant and that of appellee. A trial was had before a jury which resulted in a verdict and judgment in favor of the defendant, Fry. The only ground urged for the reversal is that the verdict and judgment are against the manifest weight of the evidence.

At about 10:30 o'clock of the morning of January 1st, 1922, Henry Knott in company with his wife, son and daughter-in-law were riding in a five passenger Buick car driven by his said son, Harold. On the front seat by the side of the driver was his wife, Nora Knott, and on the rear seat was the appellant, Henry Knott and his wife, Carrie P. Knott. The appellant was seated on the right hand side. They came from Holcomb and were driving to Rockford. They had reached the outskirts of that City and were proceeding north on Kishwaukee Street which is the main street for north and south travel through Rockford. Eighteenth Avenue crosses Kishwaukee Street at right angles. There are street car tracks running south on Kishwaukee Street to Eighteenth Avenue where they turn west. They are laid a little to the west of the center of Kishwaukee Street and slightly to the south of the center of Eighteenth Avenue. The day was clear and cold. The streets were slippery, being covered with ice. Smaller tracks had been worn in the ice by automobile traffic. Appellant's car was on the right side of Kishwaukee Street and just as it had reached the center of said street intersection or

a little north thereof the collision occured between it and the car of appellee. Appellant's car was forced into an electric light pole located near the north east corner of said street intersection and he thereby received serious injuries including the fracture of the skull, the loss of his right eye, a broken right leg and also a broken shoulder with other damage to his right arm greatly impairing its use.

It does not appear how wide either of the streets are but the space used for automobiles on Eighteenth Avenue is north of the street railway tracks. Both sides of the railway tracks are used for automobile travel on Kishwaukee Street. At the south west corner of the street intersection is located a store building. There is an open space immediately south of said store building and also immediately west thereof so that a person who is in a proper position on either street may look behind said store building upon the other street. The store building does not extend as far north as the side walk along Eighteenth Avenue. North of the sidewalk are poles for electric wires. The north rail of the railroad is twelve to fifteen feet north of the north line of said sidewalk. Appellee's car was in Eighteenth Avenue north of said north rail. He claims that at a point ninety feet from the street intersection he was traveling about twelve miles an hour. And that he then slowed down as he approached the street intersection to about five or six miles an hour. He attempted to turn north into Kishwaukee Street, and it was while he was making the turn that the collision occurred. He did not see appellant's car at any time until after the collision occurred. According to his own testimony he knew nothing of the presence of appellant's car until the accident happened. He also testified that when he was west of said store building he looked through the open space back of it and did not see the approach of any car, and that just as he was about to cross the tracks, where they curve from Kishwaukee Street into Eighteenth Avenue, he again looked in a southerly direction or as he

a little north thereof the collision occurred between it and the car of appellee. Appellant's car was forced into an electric light pole located near the north east corner of said street intersection and he thereby received serious injuries including the fracture of the skull, the loss of his right eye, a broken right leg and also a broken shoulder with other damage to his right arm greatly impairing its use.

It does not appear how wide either of the streets are but the space used for automobiles on Eighteenth Avenue is north of the street railway tracks. Both sides of the railway tracks are used for automobile travel on Kishwaukee Street. At the south west corner of the street intersection is located a store building. There is an open space immediately south of said store building and also immediately west thereof so that a person who is in a proper position on either street may look behind said store building upon the other street. The store building does not extend as far north as the side walk along Eighteenth Avenue. North of the sidewalk are poles for electric wires. The north rail of the railroad is twelve to fifteen feet north of the north line of said sidewalk. Appellee's car was in Eighteenth Avenue north of said north rail. He claims that at a point ninety feet from the street intersection he was traveling about twelve miles an hour. And that he then slowed down as he approached the street intersection to about five or six miles an hour. He attempted to turn north into Kishwaukee Street, and it was while he was making the turn that the collision occurred. He did not see appellant's car at any time until after the collision occurred. According to his own testimony he knew nothing of the presence of appellant's car until the accident happened. He also testified that when he was west of said store building he looked through the open space back of it and did not see the approach of any car, and that just as he was about to cross the tracks, where they curve from Kishwaukee Street into Eighteenth Avenue, he again looked in a southerly direction or as he

termed it "katty-cornered" across the street and saw no car approaching. He further testified he was well acquainted with that street intersection and his particular attention was directed to the north to see if a street car might be approaching.

Outside of those who were in appellant's car there were no eye witnesses to the accident. Appellant himself was rendered immediately unconscious by his injuries and was unable to describe anything which occurred after that time. A witness by the name of Raguse, testified to a conversation he claimed to have had with Harold Knott, in which the latter is quoted as saying about six weeks after the accident occurred, that he could not turn to the right on Eighteenth Avenue so as to avoid the collision because he was going better than twenty-five miles an hour. Harold Knott when called in rebuttal positively denied having made any such statement. On direct examination he testified that he was driving from eight to ten miles an hour. His, wife, Nora Knott, testified that their car was being driven about ten or twelve miles an hour. The appellant Henry Knott testified the car was going from eight to twelve miles an hour.

The car driven by appellant's son was the heavier of the two cars. The witnesses who came to the scene of the accident immediately after it occurred, testified that appellant's car was on the east side of the street next to the curbing and against the electric light pole; that the rear half of the left running board was smashed; both rear fenders were damaged; that the body of the car on the left side was broken. These facts irresistibly lead to the conclusion that the front end of appellant's car was further north than the front end of appellee's car at the time of the collision and that appellant's car was struck on the left side near the center by the right front end or side of appellee's car.

Counsel for appellee argue that the facts and circumstances surrounding the accident disclose that the driver of appellant's car was driving at a high and dangerous rate of speed and that such was the cause of the accident. We can find nothing in the record to

turned to "Katty-cornered" across the street and saw no car approaching. He further testified he was well acquainted with that street intersection and his particular attention was directed to the north to see if a street car might be approaching.

Outside of those who were in appellant's car there were no eye witnesses to the accident. Appellant himself was rendered immediately unconscious by his injuries and was unable to describe anything which occurred after that time. A witness by the name of Rogues, testified to a conversation he claimed to have had with Harold Knott, in which the latter is quoted as saying about six weeks after the accident occurred, that he could not turn to the right on Eighteenth Avenue so as to avoid the collision because he was going better than twenty-five miles an hour. Harold Knott when called in rebuttal positively denied having made any such statement. On direct examination he testified that he was driving from eight to ten miles an hour. His wife, Nora Knott, testified that their car was being driven about ten or twelve miles an hour. The appellant Henry Knott testified the car was going from eight to twelve miles an hour.

The car driven by appellant's son was the heavier of the two cars. The witnesses who came to the scene of the accident immediately after it occurred, testified that appellant's car was on the east side of the street next to the curbing and against the electric light pole; that the rear half of the left running board was smashed; both rear fenders were damaged; that the body of the car on the left side was broken. These facts irresistibly lead to the conclusion that the front end of appellant's car was further north than the front end of appellee's car at the time of the collision and that appellant's car was struck on the left side near the center by the right front end or side of appellee's car.

Counsel for appellee argue that the facts and circumstances surrounding the accident disclose that the driver of appellant's car was driving at a high and dangerous rate of speed and that such was the cause of the accident. We can find nothing in the record to

justify this claim except the alleged admission claimed to have been made by Harold Knott to Raguse some six weeks after the accident occurred and also the fact that Harold testified that just as he got to the street intersection he saw appellee's car something like forty or fifty feet away coming toward him around twenty to twenty-five miles an hour; that the first thing he thought of was to stop his car but he could not do that without stopping in front of appellee. He then decided to "step on the gas" and get out of the way. He followed this thought but was unable to avoid being run into. If Harold found himself in such a situation he was justified in using his best judgment in attempting to avoid injury and if he increased his speed from ten to twelve miles an hour to a greater rate of speed in attempting to avoid an accident he can not be held to have contributed to the accident. It seems most improbable, under the circumstances here presented, that he would make such a statement to Raguse, as it is claimed he did.

Appellee's testimony that he looked twice to see whether any car was approaching on Kishwaukee Street from the south, is hard for us to reconcile with the undisputed facts in this case. He may have looked behind the store building from Eighteenth Avenue to Kishwaukee Street. He could easily have done this without seeing appellant's car. Both cars had to be in the right position for the driver of one to see the other. There is nothing in the record to show which car was further from the intersection at the time appellee was in a position to have seen appellant's car. But he says that he looked a second time just as he was about to cross the car tracks on Kishwaukee Street and that he did not see appellant's car. His counsel argue from this that appellant's car was then not in view and that this indicates that such car came at a high rate of speed and crashed into appellee's car. The physical facts shown by the condition of the cars after the accident positively refute such contention. Bus aside from this, if, as appellant claims he looked in a southerly direction as he was about to cross the railroad tracks, why is it that he did not see the car? It was somewhere on Kishwaukee Street.

justify this claim except the alleged admission claimed to have been made by Harold Knott to Hague some six weeks after the accident occurred and also the fact that Harold testified that just as he got to the street intersection he saw appellee's car something like forty or fifty feet away coming toward him around twenty to twenty-five miles an hour; that the first thing he thought of was to stop his car but he could not do that without stopping in front of appellee. He then decided to "step on the gas" and get out of the way. He followed this thought out was unable to avoid being run into. If Harold found himself in such a situation he was justified in using his best judgment in attempting to avoid injury and if he increased his speed from ten to twelve miles an hour to a greater rate of speed in attempting to avoid an accident he can not be held to have contributed to the accident. It seems most improbable, under the circumstances here presented, that he would make such a statement to Hague, as it is claimed he did.

Appellee's testimony that he looked twice to see whether any car was approaching on Kinsman Street from the south, is hard for us to reconcile with the undisputed facts in this case. He may have looked behind the store building from Eighteenth Avenue to Kinsman Street. He could easily have done this without seeing appellant's car. Both cars had to be in the right position for the driver of one to see the other. There is nothing in the record to show which car was further from the intersection at the time appellee was in a position to have seen appellant's car. He says that he looked a second time just as he was about to cross the car tracks on Kinsman Street and that he did not see appellant's car. He counsel argues from this that appellant's car was then not in view and that this indicates that such car came at a high rate of speed and crashed into appellee's car. The physical facts shown by the condition of the cars after the accident positively refute such contention. But aside from this, if, as appellant claims he looked in a southerly direction as he was about to cross the railroad tracks, why is it that he did not see the car? It was somewhere on Kinsman ne Street.

If it was straight in front of him or even to the south, there was nothing to obstruct his vision and he could have seen it had he looked in either of those directions. If it was north of him, he had to run faster than it was going in order to collide with it. His testimony that he did not see the car at all until after the collision admits of no other deduction than that he did not look in the direction the car was coming from, just before the collision. Section 33 of the Motor Vehicle Law provides that "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." Under this section it was the duty of appellee to give the right of way to appellant's car. This appellee did not do and from our view of the evidence he made no effort whatsoever to respect the right of way which appellant had at that particular time. Under the facts in this case as shown by the evidence, appellee was running his car at a high rate of speed with total disregard to the rights of appellant. The accident seems to have been caused solely by the negligence of appellee.

It is urged upon us that there is a conflict of testimony in this case and that, therefore, we should hesitate to reverse the judgment and order a new trial. It is a well established rule of law that a judgment will not be set aside when there is contrariety of evidence, if the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict. In this case there is no substantial contrariety of evidence. The facts and circumstances as shown by such evidence, can not by any fair and reasonable intendment authorize the verdict which was entered in this case. The cause is therefore reversed and remanded for a new trial.

Reversed and remanded.

If it was straight in front of him or even to the south, there was nothing to obstruct his vision and he could have seen it had he looked in either of those directions. If it was north of him, he had to run faster than it was going in order to collide with it. His testimony that he did not see the car at all until after the collision admits of no other deduction than that he did not look in the direction the car was coming from, just before the collision. Section 33 of the Motor Vehicle Law provides that "All vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left." Under this section it was the duty of appellee to give the right of way to appellant's car. This appellee did not do and from our view of the evidence he made no effort whatsoever to respect the right of way which appellant had at that particular time. Under the facts in this case as shown by the evidence, appellee was running his car at a high rate of speed with total disregard to the rights of appellant. The accident seems to have been caused solely by the negligence of appellee.

It is urged upon us that there is a conflict of testimony in this case and that, therefore, we should decline to reverse the judgment and order a new trial. It is a well established rule of law that a judgment will not be set aside when there is conflicting of evidence, if the facts and circumstances, of a fair and reasonable character, will authorize the verdict. In this case there is no substantial conflicting of evidence. The facts and circumstances as shown by such evidence, can not by any fair and reasonable intendment authorize the verdict which was entered in this case. The cause is therefore reversed and remanded for a new trial.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Jan. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson

Clerk of the Appellate Court.

7104

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on OCT 27 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the [illegible]
in the year of our [illegible]
twenty-two, within and for the [illegible]
of Illinois:

Present: The Hon. [illegible]
Hon. [illegible]
Hon. [illegible]
[illegible]
[illegible]

[illegible]
[illegible]
[illegible]
[illegible]

[illegible]
[illegible]
Clerk [illegible]
following [illegible]

General No. 7104 No. 49

W. A. Hill & Company, Defendants in Error,

vs. Error to [redacted]o. Peoria.

A. Jacobson, Plaintiff in Error.

Jones, P. J.

This suit was begun before a justice of the peace and was afterward tried on appeal in the circuit court without a jury. Judgment was rendered against plaintiff in error, A. Jacobson for $268.60 and costs.

The plaintiff in error is a practicing attorney in Peoria. His brother-in-law, Sol. M. Lipkin, was adjudged a bankrupt in December, 1913. Lipkin was then indebted to W. A. Hill & Company, defendants in error in the sum of $200.00. Later he became desirous of being discharged in bankruptcy. Defendants in error threatened to make objections to such discharge and also threatened to begin criminal proceedings against him. Lipkin thereupon began negotiations to settle with defendant in error.

It is claimed by plaintiff in error that defendant in error, W. A. Hill agreed to settle the claims of his firm against Lipkin if plaintiff in error and his brother, Meyer Jacobson would give defendants in error their promissory note for $200.00 payable twenty months after date thereof; that pursuant to this arrangement, A. Jacobson went to his office and there prepared the note in question and after signing the same delivered it to Lipkin with the understanding that Meyer Jacobson would also sign it before its delivery to plaintiffs in error; that Meyer Jacobson refused to sign the note, but notwithstanding that fact, Lipkin delivered it to defendants in error who retained it until the bringing of suit thereon; that the delivery of the note to defendants in error by Lipkin was unauthorized; that such delivery was invalid because of the understanding that the instrument was not to be deemed complete

General No. 7104 No. 49

W. A. Hill & Company, Defendants in Error,

vs. Error to [illegible]. Peoria.

A. Jacobson, Plaintiff in Error.

Jones, P. J.

This suit was begun before a justice of the peace and was afterward tried on appeal in the circuit court without a jury. Judgment was rendered against plaintiff in error, A. Jacobson for $258.60 and costs.

The plaintiff in error is a practicing attorney in Peoria. His brother-in-law, Sol. M. Lipkin, was adjudged a bankrupt in December, 1915. Lipkin was then indebted to W. A. Hill & Company, defendants in error in the sum of $800.00. Later he became desirous of being discharged in bankruptcy. Defendants in error threatened to make objections to such discharge and also timeatened to begin criminal proceedings against him. Lipkin therefore began negotiations to settle with defendant in error.

It is claimed by plaintiff in error that defendant in error, W. A. Hill agreed to settle the claims of his creditor Lipkin if plaintiff in error and his brother, Meyer Jacobson would give defendants in error their promissory note for $200.00 payable twenty months after date thereof; that [illegible] to this arrangement, A. Jacobson went to his office and there discussed the matter in question and after signing the same delivered it to Lipkin with the understanding that Meyer Jacobson would also sign it before its delivery to plaintiffs in error; that Meyer Jacobson refused to sign the note, but notwithstanding that fact, Lipkin delivered it to defendants in error who relied on and with the knowledge of suit thereon; that the delivery of the note to defendants in error by Lipkin was unauthorized; that such delivery was invalid because of the understanding that the instrument was not to be delivered without

until it had been signed by both plaintiff in error and by the said Meyer Jacobson and therefore that the rendition of judgment against plaintiff in error was improper.

Defendants in error deny that there was any understanding between them and plaintiff in error that Meyer Jacobson should sign the note but claim that when the matter of settlement was under consideration they offered to accept a note signed by either plaintiff in error or the said Meyer Jacobson; that Lipkin told them Meyer Jacobson would not sign the note, whereupon it was agreed that a note signed by plaintiff in error along would be accepted by defendants in error and that the note sued on in this case was so executed and delivered by the said plaintiff in error.

Under our negotiable instrument act, where an instrument is no longer in the possession of the party whose signature appears thereon, a valid and intentional delivery is presumed, until the contrary is proved. In this case the burden was upon plaintiff in error to prove that the delivery of the note in question was upon condition that it be signed by Meyer Jacobson as well as by the plaintiff in error and the question as to whether or not the delivery was intentional was purely one of fact. The evidence in this case was conflicting but the witnesses were sworn and examined in open court and the trial judge was in the best position to determine the weight and credit which should be given to the testimony of the respective witnesses and we are therefore disinclined to disturb his findings. The judgment is affirmed.

Judgment affirmed.

until it had been signed by both plaintiff in error and by the said Meyer Jacobson and therefore that the rendition of judgment against plaintiff in error was improper.

Defendants in error deny that there was any understanding between them and plaintiff in error that Meyer Jacobson should sign the note but claim that when the matter of settlement was under consideration they offered to accept a note signed by either plaintiff in error or the said Meyer Jacobson; that Lipkin told them Meyer Jacobson would not sign the note, whereupon it was agreed that a note signed by plaintiff in error alone would be accepted by defendants in error and that the note sued on in this case was so executed and delivered by the said plaintiff in error.

Under our negotiable instrument act, where an instrument is no longer in the possession of the party whose signature appears thereon, a valid and intentional delivery is presumed, until the contrary is proved. In this case the burden was on plaintiff in error to prove that the delivery of the note in question was upon condition that it be signed by Meyer Jacobson as well as by the plaintiff in error and the question as to whether or not the delivery was intentional was purely one of fact. The evidence in this case was conflicting but the witnesses were sworn and examined in open court and the trial judge was in the best position to determine the weight and credit which should be given to the testimony of the respective witnesses and we are therefore disinclined to disturb his finding. The judgment is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

R. H. denied Jan. 4, 1923

7047
&
7105

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS A. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Walter Spangler, plaintiff in error,

7047 vs. Error to Woodford 13

Marie D. Spangler, defendant in error,

Marie D. Spangler, appellee,

7105 vs. Appeal from Woodford 50

Walter Spangler, appellant,

Partlow, J.

The two cases above entitled are from the same court, between the same parties, relate to the same general subject matter and have the same counsel. In one of the briefs for Mrs. Spangler her counsel say: "It is respectfully submitted that the two cases be read together, so that a more complete history and a better understanding of the cases and the law applicable thereto may be had." We have accordingly pursued that course; and we conclude that a single opinion covering both cases will save much repetition.

The parties were once husband and wife and lived in York, Pennsylvania, and other places near there, and were parents of a child, Mary Gelista Spangler, born February 20, 1909. They separated in February, 1910. The mother has the child. Afterwards Spangler removed to Secor, Woodford County, Illinois, where he still lives. On July 29, 1914, he filed in the circuit court of Woodford County a bill for divorce and had service upon his wife by publication and mailing of notice to her at McSherry'stown, Adams County, Pennsylvania, where she then lived. She received the notice and consulted a justice of the peace in her town and later consulted lawyers in Pennsylvania, wrote to the clerk of the circuit court of Woodford County, and to different lawyers in that county, but did not appear nor answer. She was defaulted and the cause was heard on September 28, 1914. A divorce was granted Spangler on the ground, among other things, that Mrs. Spangler wilfully deserted her husband without cause on February 2, 1910, and so continued thereafter. Several years later Spangler married again. On June 25, 1921,

Walter Spangler, [illegible]

7041 vs. [illegible]

Marie D. Spangler, defendant in error.

Marie D. Spangler, [illegible].

7409 vs. [illegible]

Walter Spangler, appellant.

Petition, 1.

The two cases above entitled are [illegible] the same parties, relate to the same property, [illegible] the same counsel. In one of the bill is for [illegible]. Counsel [illegible] "It is reasonably [illegible] to [illegible] as to [illegible], so that a more complete [illegible] and [illegible] and will [illegible] cases [illegible]

The [illegible] Vanna, and other [illegible] Walter Spangler, [illegible] Island. The [illegible] Woodford County, [illegible] files in the circuit court [illegible] at Washington, [illegible] the [illegible] tion and [illegible] of the circuit court [illegible] that county, [illegible] cause [illegible] on the ground, [illegible] for [illegible] [illegible] Several years [illegible]

Mrs. Spangler filed in said divorce suit in Woodford County a petition asking that the decree be set aside or amended; that she have leave to answer the bill and that she have such other relief as to equity shall appertain. She filed an answer without leave. The petition was verified by her and in addition she filed a long affidavit, setting out her poverty and ill-health, and the advice she sought and inquiries she made after receiving notice of the pendency of the divorce suit. She stated that she obtained a certified copy of the decree of divorce in January, 1931, and that this was the first she knew a divorce had been granted. In said affidavit she set up civil proceedings which she alleged she brought against her husband in York, Pennsylvania, soon after the separation, under which Spangler or his bondsmen paid $300 for the support of herself and child, and that he was ordered to pay $3.00 per week, which sum he paid till June 1, 1913, and since which time he had paid nothing. In the answer which she filed without leave she asked that Spangler be compelled to pay her said $3.00 per week allowed by the Pennsylvania court and a reasonable amount for the support of herself and child. Spangler was notified of the filing of said petition and appeared by counsel and moved to strike the petition from the files because insufficient in law and filed too late. He also filed with said motion an affidavit denying any fraud by him on the court and denying that Mrs. Spangler was entitled to the relief sought by her and he set up his subsequent marriage in December, 1917, in reliance upon the validity of said divorce. The court denied the motion to strike the petition from the files but heard the petition upon affidavits and counter affidavits and denied the prayer thereof. Mrs. Spangler did not preserve the proofs then heard by a certificate of evidence, and did not appeal from said order nor prosecute a writ of error therefrom, nor has she assigned cross errors upon the record wherein these matters appear. By this petition she submitted to the determination of the court in said divorce suit her right to have an allowance from the father of her child for its support from June 1, 1913, to the time of that hearing, and for the future. Whether the denial of such an allowance was right or wrong, it was an adjudication

Mrs. Spangler filed in this divorce [illegible]
asking that the record be set aside [illegible]
answer the bill and when the [illegible]
appeared. She [illegible]
filed by her and in addition she filed [illegible]
her poverty and ill-health. [illegible]
she made other pleadings [illegible]
She stated that she obtained a certificate [illegible]
in January, 1921, [illegible]
own practice. In said affidavit [illegible]
she alleges she brought [illegible]
after the separation, under [illegible]
for the support of a child [illegible]
$5.00 per week, which [illegible]
time he had paid nothing. [illegible]
she stated that [illegible]
filed by the Plaintiff [illegible]
support of herself [illegible]
said petition [illegible]
from the [illegible]
filed with said [illegible]
court [illegible]
by her [illegible]
reliance [illegible]
motion to [illegible]
upon affidavits [illegible]
Mrs. Spangler [illegible]
of evidence, [illegible]
of error therefore, [illegible]
wherein these matters [illegible]
determination of the [illegible]
allowance from the father [illegible]
1913, to the time of that [illegible]
denial of such an allowance [illegible]

against her claim, binding upon her till set aside in some proper proceeding.

On August 3, 1921, nine days after the denial of her petition in the divorce case, Mrs. Spangler brought an action of debt against Spangler in said circuit court of Woodford County, and filed a declaration therein based on a judgment alleged to have been rendered in favor of Mrs. Spangler and against Spangler in the court of Quarter Sessions of the Peace of the County of York, Pennsylvania, at the February Term, 1910, for the payment by Spangler to Mrs. Spangler of $3.00 per week beginning February 14, 1910, and continuing till the further order of the said court. This declaration in debt charged that on January 28, 1910, Spangler wilfully deserted Mrs. Spangler and her child. Spangler was served in that action of debt on August 3, 1921.

Before anything further was done in that action of debt, Mrs. Spangler on September 9, 1921, filed another petition in said divorce case. She therein set up among other things her poverty and the proceedings against Spangler in said Pennsylvania court which resulted in the payment of $3.00 per week by him up to June 1, 1913, and his failure to pay anything thereafter for the support of herself and child. It set up his proceedings for divorce and denied the charge he made in his bill for divorce that she had deserted him and alleged that in fact he had deserted her. It set up the fact that neither the bill for divorce nor the decree of divorce made any reference to said child nor any provision for its custody and support. The petition stated that Mrs. Spangler had supported and clothed said child and furnished it medical service and paid for its schooling since June 1, 1913, and that by reason of ill-health, she is unable to continue to support said child. She stated her information as to the ability of Spangler to support the child and the petitioner, and that Spangler is not a fit ~~fit~~ person to have the custody and education of said child and the reasons therefor, which related to religious differences between the parties. The petition further alleged, what is not otherwise shown in this record, that in 1910 Spangler sued Mrs. Spangler for a divorce in Pennsylvania and she filed an answer and that the cause

against her claim, binding upon her till she asks in some proper proceeding.

On August 3, 1921, nine days after the denial of her petition in the divorce case, Mrs. Spangler brought an action of ejectment against Spangler in said circuit court of Wicklow County, and filed a declaration therein based on a judgment alleged to have been rendered in favor of Mrs. Spangler and against Spangler in the court of Quarter Sessions of the Peace of the County of York, Pennsylvania, at the February term, 1910, for the payment by Spangler to Mrs. Spangler of $[illegible].00 per week beginning February 14, 1910, and continuing till the further order of the said court. This declaration in debt charged that on January 25, 1910, Spangler willfully deserted Mrs. Spangler and her child. Declaration was served in that action of debt on August 3, 1921.

Before anything further was done in that action of debt, Mrs. Spangler on September 6, 1921, filed another petition in said divorce case. She therein set up [illegible] proceedings against Spangler in [illegible] the payment of $3.00 per week [illegible] ure to pay anything [illegible]. It set up his proceedings for [illegible] in his bill for divorce that [illegible] fact he had deserted her. [illegible] divorce nor the decree of divorce [illegible] any provision for [illegible] Mrs. Spangler had [illegible] medical service and paid for its [illegible] that by reason of ill-health [illegible] said child. [illegible] to support the child and [illegible] fit her person to have the custody [illegible] the reasons therefor, which relate to [illegible] the petition. The petition further [illegible] shown in this record, that in 1910 [illegible] a divorce in Pennsylvania and she filed [illegible]

is still pending in said court of Pennsylvania. The prayer of the petition was that the decree of divorce be vacated, that Mrs. Spangler be awarded the custody of the child and Spangler be required to pay to Mrs. Spangler a reasonable sum for the support and education of said child and that such order be entered as of the date of the filing of the original decree of divorce. Spangler and his attorneys were notified of the filing of said petition and appeared and moved to strike said last named petition from the files on the ground that the court was without jurisdiction to hear it and to grant the relief sought, and that the petition showed that Mrs. Spangler was not entitled to the relief sought and that the petition was filed without leave of court. That motion was heard and denied. Thereafter said petition was heard upon proofs presented. Spangler did not appear by counsel, at said hearing, but he was called as a witness by Mrs. Spangler and testified. That evidence was preserved by a certificate of evidence. The court entered a decree upon said petition, finding it had jurisdiction of the parties and the subject matter, finding the marriage and the birth of said child, and the divorce; that Spangler since June, 1913, had contributed nothing to the support and education of the child; that it is the duty of Spangler to support the child, and that Mrs. Spangler on account of sickness is unable to support the child, and it found the income of Spangler and his ability to pay the sum fixed. The decree awarded the custody of the child to Mrs. Spangler until the further order of the court and ordered that Spangler pay her $250 within ten days and the further sum of $25 each month beginning November 1, 1931, and the costs of suit, and that execution issue for any unpaid installment. The first above entitled cause is a writ of error sued out by Spangler to review that decree.

Spangler questions the jurisdiction of the court to entertain the petition of Mrs. Spangler in said divorce proceeding. We regard what is said in Thomas v. Thomas, 250 Ill. 354, on p. 358, as decisive of that question. The court there said:

> "The custody of the children was necessarily comprehended within the scope of the original bill although nothing was

to still pending in said court of Pennsylvania. The prayer of the petition was that the bonds of divorce be vacated, that Mrs. Spangler be awarded the custody of the child, and Spangler be required to pay to Mrs. Spangler a reasonable sum for the support and education of said child and that such order be entered as of the date of the filing of the original decree of divorce. Spangler and his attorneys were notified of the filing of said petition and appeared and moved to strike said last named petition from the files on the ground that the court was without jurisdiction to hear it and to grant the relief sought, and that the petition showed that Mrs. Spangler was not entitled to the relief sought and that the petition was filed without leave of court. That motion was heard and denied. Thereupon said petition was heard upon proofs presented. Spangler did not appear by counsel at said hearing, but he was called as a witness by Mrs. Spangler and testified. That evidence was received by the court [illegible] objective. The court entered a decree upon [illegible] modification of the decree and the [illegible] and the birth of said child, [illegible] June, 1913, has contributed nothing to [illegible] of the child; that it is the duty of Spangler to support the child, and that Mrs. Spangler on account of [illegible] to support the child, and it found the income of Spangler [illegible] fixed. The court awarded the custody of the child [illegible] until the further order of the court [illegible] $250 within the [illegible] November 1, 1921, and the costs of [illegible] for any unpaid installments. The first [illegible] writ of error sued out by Spangler to review that decree.

Spangler questions the jurisdiction of the court to [illegible] the petition of Mrs. Spangler [illegible] divorce [illegible] what is said in Thomas v. Thomas, [illegible] of that question. The court there said:

"The custody of the children was [illegible] within the scope of the original bill, although [illegible]

> said about them. The filing of the original bill for divorce brought within the jurisdiction of the court the minor children of the parties by virtue of the statute, which authorizes the court, on application, to make such order concerning the custody and care of children during the pendency of the suit as may be deemed expedient and for the benefit of the children, and if a divorce shall be decreed the court may make such order touching the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just."

The bill and answer in that case said nothing about the existence of children of the marriage. The language above quoted therefore applies to this case. It is common practice in this state in divorce and separate maintenance cases to apply to the court at a later term than the entry of the decree for modifications as to the custody of the children and their support, and to grant changes in those matters as circumstances may require. We are of the opinion that Mrs. Spangler was within her rights in filing this petition in the divorce case after the term at which the divorce was decreed and while the child was not of age. The proof justified the allowance. Spangler is not wealthy, but his income at the time the order was made justified the allowance. In years prior to that his income was less and perhaps would not have justified so large an allowance then. If his income hereafter decreases or increases, the court has jurisdiction to change the allowance according to the circumstances of the parties.

There is one error in the order here under discussion. It awarded the custody of the child to the mother and did not provide that the father might visit the child. In Zimmerman v. Zimmerman, 242 Ill. 552, the court on p. 560 said: "When a trial court in a suit for divorce disposes of the custody of the minor children of the parties, it should always by its decree provide that the parent who is divested of the custody should be given the privilege of visiting the children under such terms and conditions as seem proper in that particular case." Ordinarily the place of such visitation should be within the jurisdiction of the court, but here the child has never been in the state of Illinois. The mother's home has always

been in Pennsylvania. Spangler is the one who moved from his original domicile. Under these circumstances we think it sufficient that he be given leave to visit the child at the home of the mother in Pennsylvania on certain specified dates, perhaps two or four times a year. The order will therefore be affirmed except as to the provision for the custody of the minor child, and as to that provision the order is reversed and the cause remanded to the circuit court with directions to provide for the visitation of the child by the father in connection with the order awarding the mother the custody of the child in conformity with this opinion. Spangler will pay the costs in said cause first above entitled.

After the foregoing order had been entered in the divorce case Mrs. Spangler on December 7, 1921, obtained leave in her action at law to change the action to assumpsit and to file an amended declaration. She thereby abandoned her suit upon the supposed judgment in her favor in Pennsylvania and indeed, the order in the divorce case obtained by her must bar any further action on that judgment which she set up in her petition. The amended declaration contained certain of the common counts. It alleged that Spangler was indebted to Mrs. Spangler for labor and services of Mrs. Spangler, bestowed in the business of Spangler at his request; for work done and materials furnished by her to him at his request; for money expended by her for his use at his request; and a promise by Spangler to pay the same on request, and a request and refusal to pay. Spangler filed four pleas. The first was non-assumpsit. The second was that the action did not accrue to Mrs. Spangler within five years before the filing of the amended declaration. The third was that the action did not accrue within five years before the commencement of the suit. The fourth was very lengthy, set up the facts as claimed by Mrs. Spangler, including the desertion and the divorce, and that the suit is for moneys spent for the child in Pennsylvania and that liability therefor is governed by the laws of Pennsylvania, and that by those laws

[illegible]

Spangler is not liable to Mrs. Spangler for the support of the child. Issue was joined on the first three pleas. A demurrer to the fourth plea was overruled and a replication thereto was then filed by Mrs. Spangler, which averred that Spangler deserted Mrs. Spangler and the child, and that by the laws of Pennsylvania Spangler was liable for the support of the child. This replication concluded to the country. There was a jury trial and a verdict for Mrs. Spangler for $1750. Spangler moved for a new trial and this was denied. Mrs. Spangler had judgment on the verdict and Spangler appeals, and that appeal is the case secondly above entitled.

Spangler complains of the denial of a motion made by him for a bill of particulars. Said motion and the showing for and against it and the ruling of the court thereon are not contained in the bill of exceptions, and therefore that question is not preserved for review.

Several sufficient reasons for reversal appear in the record. Mrs. Spangler introduced evidence tending to show that Spangler deserted her. Afterwards Spangler introduced the decree of divorce. That decree was binding upon Mrs. Spangler and was conclusive that she wilfully deserted him without cause. The court instructed the jury that that decree was binding upon the parties, but the court was also requested by Spangler to instruct the jury to disregard all other evidence on that subject except the decree, and that instruction was refused. It should have been given. The court gave two instructions for plaintiff submitting to the jury the question whether the father wrongfully abandoned and deserted the child. There was no evidence that he deserted the child. The only evidence on the subject was that shortly after the separation of the parents Spangler had the child in his possession at his father's home, and that in his absence and without his consent Mrs. Spangler took the child away from his father's home. That instruction therefore should not have been give. One of the issues under the pleadings was whether

under the laws of Pennsylvania Mrs. Spangler could recover for the support and education of the child. The decision in Fitler v. Fitler, 33 Pa. St. 50, was in evidence, and whether the question be treated as one of fact or of law, it establishes that under the circumstances of this case, the law of Pennsylvania is that the father is not liable to the mother for the support of the child in an action at law. Mrs. Spangler sought to avoid the effect of that decision by oral proof that Spangler deserted her. This evidence was no doubt competent when received, but afterwards the bill for divorce and decree of divorce by the circuit court of Woodford County were put in evidence, and they conclusively established, as against Mrs. Spangler, that she was the one guilty of wilful desertion without cause. Thereupon Spangler offered an instruction that Mrs. Spangler could not recover, which the court refused. That instruction should have been given. We do not hold that the law of Pennsylvania governs the right of action in this case, nor that the fourth plea was proper, but as Mrs. Spangler did not abide by her demurrer thereto, but formed an issue of fact thereon, and the proof on that issue was conclusive against her, a verdict against her should have followed.

We are disposed to hold under the case made by this record, that a mother for whose fault a divorce is granted may not thereafter recover from her former husband what she has expended for the support and education of the child of the marriage in an action at law upon an implied promise by the former husband to pay the same. Numerous Illinois authorities are cited by Mrs. Spangler to sustain her contention that he is so liable, but, with a single exception in an appellate court case where the liability at law was not discussed, the cases so cited are actions for divorce or separate maintenance or the like, where the court applies equitable principles in determining who shall support the child. Cases may readily be imagined where the mother without cause had concealed the child and refused to permit the father to visit the child, or where

under the law of Pennsylvania [illegible] could recover for the support and education of the child. The court in Miller v. Miller, 32 Pa. St. 30, was in error, and whether the question be treated as one of fact or of law, it seems likely that under the circumstances of this case, the law of Pennsylvania is that the father [illegible] liable to the mother for the support of the child [illegible] law. Spangler sought to avoid the effect of that decision by [illegible] that Spangler deserted her. [illegible] when received, but afterwards the bill for [illegible] divorce by the circuit court of [illegible] and in evidence, and they conclusively [illegible] Spangler, that she was the one guilty [illegible] Spangler offered no instruction [illegible] which the court refused. [illegible] do not hold that the law of [illegible] in this case, nor that the [illegible] did not abide by her [illegible] thereon, and the [illegible] verdict against her [illegible].

We are disposed to hold [illegible] a mother for whose fault a [illegible] recover from her former [illegible] and education of the child [illegible] limited process by the [illegible] authorities are [illegible] to [illegible] is no liable, and, with [illegible] where the liability [illegible] tions for divorce [illegible] applies equitable [illegible] Cases may readily be [illegible] the child and [illegible] the child, or more

the mother is wealthy and has cared for and educated the child at great expense, while the father is a pauper and is unable because of ill health to support himself. Under such circumstances a court of equity would be governed by the circumstances and conduct of the parties. If an action at law may be maintained on an implied promise these considerations cannot avail the father, whereas in a court of equity they would have due consideration in determining the question. It is also clear to us that the circuit court of Woodford County in the divorce case acquired jurisdiction to determine the custody of this child and what contribution, if any, the father should make to its support, and therefore a court of law could not thereafter be vested with the power to determine those questions. In her last petition above recited, Mrs. Spangler asked that Spangler be compelled to pay these expenses from the first day of June, 1913. She sought that relief in the divorce case. She obtained much of the relief which she sought. She did not appeal or assign errors upon the failure to award her all the relief she sought. We are of the opinion that after having obtained that relief she could not further maintain an action at law for the same thing from her former husband.

The judgment in the case second above entitled is therefore reversed at her costs with this finding to be entered in the judgment. (We find that in the divorce case the court acquired and exercised jurisdiction to determine the questions of the sum, if any, to be paid by Spangler for the support and education of the child, and that Mrs. Spangler could not thereafter have a remedy at law against him for the same thing.)

The order in the first above entitled case is affirmed in part and reversed in part at the costs of Spangler, and the cause is remanded to the circuit court with directions to enter an order as to the custody of the child in conformity with this opinion. In the second above entitled cause the judgment is reversed at the costs of Mrs. Spangler, with the above finding.

the mother is wealthy and has cared for and educated the child at great expense, while the father is a pauper and is unable because of ill health to support himself. Under such circumstances a court of equity would be restrained by the circumstances and conduct of the parties. If an action at law may be maintained on an implied promise these considerations cannot avail the father, whereas in a court of equity they would have due consideration in determining the question. It is also clear to us that the circuit court of Woodford County in the divorce case had jurisdiction to determine the custody of this child and what contribution, if any, the father should make to its support, and therefore a court of law could not therefore be vested with the power to disturb those findings. The last petition above recited, was brought after that appellee was compelled to pay those expenses from the first day of June, 1899, who sought that relief in the divorce case. The petition and the relief which she sought. She did not ask or seek or obtain the failure to grant her that relief in court. We are of the opinion that after having obtained that relief she could not further maintain an action at law for the same thing from her former husband.

The judgment in the case cited [illegible] is [illegible] and at her costs with [illegible] to be [illegible] in the judgment. (We find that in the divorce case the court [illegible] jurisdiction to determine the questions of [illegible], if any, to be paid by complainant for the support and education of the child, and that the expenses could not [illegible] for the same thing.)

The order in the first above entitled case is affirmed in part and reversed in part at the costs of appellee, and the cause is remanded to the circuit court with directions to enter an order in accordance with this opinion.

In the second above entitled case the judgment of the court is reversed at the costs of the appellee, with the costs [illegible].

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Jan. in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson.
Clerk of the Appellate Court.

R. H. denied Jan 4, 1923
7064

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Cynthia J. Case, Appellant,	)	
vs.	)	Appeal from the Circuit Court
Charles V. Weddell, Appellee.	)	of DeKalb.

Partlow, J.

Appellant, Cynthia J. Case, began suit in the circuit court of DeKalb county against appellee, Charles V. Weddell, to recover damages alleged to have been sustained by her by reason of the sale to her, by the appellee and his alleged co-conspirators, of 750 shares of the capital stock of the United Agency, a credit rating corporation, the purchase price of the stock being $16,294.00. Upon issue being joined, there was a trial by jury. At the close of the evidence on behalf of the appellant, on motion of the appellee, a verdict was directed in favor of the appellee. Judgment was rendered against the appellant for costs and in bar of the action, and from that judgment an appeal was prosecuted. The errors assigned are that the court excluded certain evidence, and improperly directed a verdict.

The evidence tends to show the following facts. In 1908, the United Mercantile Agency was organized and purchased the business of the Early Agency and the Eastman Agency, both of which had been in existence for several years. $1,600,000.00 in stock of the United Mercantile Agency was issued in payment for the assets of the Early Agency. The United Mercantile Agency had offices in the Stock Exchange Building in Chicago, and had a large force of employees, and maintained about seventy branch offices throughout the United States. Its business consisted of furnishing credit reports similar to those furnished by Dunn and Bradstreet, and it published books containing credit ratings covering forty-three states and including over 1,000,000 corporations, partnerships and individuals. Its assets consisting of the records of these ratings together with some other personal property, cost about $2,000,000.00, in addition to the $1,600,000 in stock paid for the Early Agency. The money to develop this business

Cynthia J. Case, Appellant, vs. Charles V. Waddell, Appellee.	Appeal from the Circuit Court of DeKalb.

Partlow, J.

Appellant, Cynthia J. Case, began suit in the circuit court of DeKalb county against appellee, Charles V. Waddell, to recover damages alleged to have been sustained by her by reason of the sale to her, by the appellee and his alleged co-conspirators, of 750 shares of the capital stock of the United Agency, a credit rating corporation, the purchase price of the stock being $16,250.00. Upon issue being joined, there was a trial by jury. At the close of the evidence in behalf of the appellant, on motion of the appellee, a verdict was directed in favor of the appellee. Judgment was rendered against the appellant for costs and in bar of the action, and from that judgment an appeal was prosecuted. The errors assigned are that the court excluded certain evidence, and improperly directed a verdict.

The evidence tends to show the following facts. In 1900, the United Mercantile Agency was organized and absorbed the business of the Early Agency and the Eastman Agency, both of which had been in existence for several years. $1,000,000.00 in stock of the United Mercantile Agency was issued in payment for the assets of the Early Agency. The United Mercantile Agency had offices in the Stock Exchange Building in Chicago, and had a large force of employees, and maintained many branch offices throughout the United States. Its business consisted of furnishing credit reports similar to those furnished by Dun and Bradstreet, and it published a book containing credit ratings covering 1 [illegible]-three million [illegible] 1,000,000 corporations, partnerships and individuals. Its assets consisting of the records of these ratings together with other personal property, cost about $3,000,000.00, in addition to the $1,000,000.00 in stock paid for the Early Agency. The money to develop this [illegible]

had been raised largely through the sale of stock. In 1913, the United Mercantile Agency had about 3,500 stockholders, including the appellee.

On April 11, 1913, the United Mercantile Agency was adjudged bankrupt, and a stockholders' committee was formed to preserve the assets and effect a reorganization. This committee, on May 14, 1913, purchased of the trustee in bankruptcy the assets of the United Mercantile Agency for $22,500.00. The United Agency, the corporation in question in this case, was incorporated on May 23, 1913, and the first board of directors was elected, but did not include the appellee. Notice was sent to the 3,500 stockholders of the United Mercantile Agency recommending that they protect their holdings in that corporation by the purchase of stock in the United Agency, which stock was offered to them at $1.00 per share. The stockholders committee, it is claimed, continued in force a large percentage of the service contracts of the United Mercantile Agency, and kept intact the organization of that corporation, including most of the experienced employees.

On June 12, 1913, the stockholders' committee submitted a written proposal to the directors of the United Agency in which the committee proposed to purchase 150,000 shares of the capital stock of the United Agency, at $10.00 per share, and to pay for the same by assigning to the United Agency all of the property and assets of the United Mercantile Agency purchased by the committee at the bankruptcy sale. The directors of the United Agency accepted this proposal, but agreed to issue, not to exceed 75,000 shares of stock, and the balance of the stock was to be issued only upon the further payment of additional amounts as the board of directors should determine. After the purchase of the property of the United Mercantile Agency, and the organization of the United Agency, the latter corporation started to extend its rating system to cover the balance of the United States, and to sell its service to jobbers, wholesalers and manufacturers in the territory where it had established offices. It published semiannually credit rating books containing the ratings so far as completed. In 1919, it claimed to have credit reports and ratings on over 1,600,000 firms, corporations and

had been raised largely through the sale of stock. In 1933, the United Mercantile Agency had about 3,300 stockholders, comprising the creditors.

On April 11, 1933, the United Mercantile Agency was placed in receivership, and a stockholders' committee was formed to preserve the assets and effect a reorganization. This committee, on May 24, 1933, purchased of the trustee in bankruptcy the assets of the United Mercantile Agency for $32,500.00. The United Agency, incorporation in this case, was incorporated on May 26, 1933, and the first board of directors was elected, but did not include the creditors. Notice was sent to the 3,300 stockholders of the United Mercantile Agency, informing them that they protest their holdings in that corporation by the surrender of stock in the United Agency, which stock [illegible] $1.00 per share. The stockholders committee, it is claimed, [illegible] assessment-age of the service companies in the United [illegible], [illegible] that the organization of that [illegible] the [illegible] organized exchange.

On June 27, 1933, the stockholders' [illegible] proposal to the directors of the United Agency [illegible] to purchase 150,000 shares of the [illegible], at $10.00 per share, and to pay for the [illegible] of the property and assets of the United Mercantile Agency [illegible] committee on the basis [illegible]. The offer of the United Agency accepted this proposal, [illegible] of 1,000,000 shares of stock, and the balance of the stock [illegible] payment of additional amounts on the [illegible]. After the purchase of the property of the United Mercantile Agency, and the organization of the United Agency, the [illegible] extend its rating system [illegible] the business of the [illegible], and to sell its service to jobbers, [illegible] and [illegible] where it had established offices. [illegible] books containing the ratings so far as possible. [illegible] have credit reports and ratings on over 1,000,000 firms, corporations and

individuals, covering from 63,000 to 64,000 cities. It also claimed to have completed the ratings throughout the United States except for the Burroughs of Queens and Richmond in Greater New York and the city of Philadelphia.

In its bookkeeping, that part of its expenditures which were chargeable to the extension of its credit rating system, was added to its plant account, until the total of its capital assets of this character, on December 31, 1918, was claimed to be $3,501,640.11. The books were audited by certified accountants, and the financial statements issued from time to time were supposed to be based on the audits made by these accountants. The corporation maintained offices in the Gunther building, in Chicago where it occupied two floors, and it had a large number of branch offices in the leading cities of the United States. A large force of employees was required to procure credit information, to compile this information and to furnish the results to customers of the agency.

The money necessary to complete these ratings, and carry on the business, was to be raised through the sale of stock. To accomplish this, salesmen were employed and a securities department was organized. The appellee was a retired farmer residing at DeKalb, Illinois, and his farm was located near Rollo, Illinois, about six miles from the farm formerly owned by the husband of appellant. It was by reason of his trips to Chicago, and by the receipts of reports and statements, that he kept in touch with the company's activities. The appellee was known by appellant and her husband for years, and was highly respected as a man of integrity and good judgment, and this fact, coupled with the fact that he was a large investor in the stock of the complany, influenced the appellant and her daughter to buy stock. The first certificate purchased by appellant was dated June 7, 1917, the second August 23, 1917, and the third March 1, 1918. Shortly afterwards, a ban was placed by the government on the sale of securities, except Liberty Bonds, unless permission was granted by The Capital Issues Committee. Permission to sell 41,027 shares of preferred stock was granted in June, 1918, on condition that they were

individuals, covering from 64,000 to 65,000 cities. It also claimed to have completed the rating the United States report for the Boroughs of Queens and Richmond in Greater New York and the city of Philadelphia.

In its bookkeeping, that part of its expenditures which were chargeable to the extension of its credit rating system, was added to its plant account, until the total of its capital assets of this character, on December 31, 1918, was claimed to be $3,[illegible],[illegible]. The books were audited by certified accountants, and the financial statement is issued from time to time were supposed to be based on the audits made by these accountants. The corporation maintained offices in the Gas Per Building, in Chicago where it occupied two floors, and it had a large number of branch offices in the leading cities of the United States. A large force of employees was required to process credit information, to compile this information and to furnish the results to subscribers of the service.

The money necessary to [illegible] the business, and out of the business, was to be raised through the sale of stock. To accomplish this, salesmen were employed and a security [illegible] was [illegible]. The appellee was a retired farmer residing at Dekalb, Illinois, and his farm was located near Rollo, Illinois. [illegible] for the farm [illegible] owned by the husband of the appellant. It was [illegible] to Chicago, and by the receipt of reports and [illegible], that he became in touch with the company's activities. The appellee was [illegible] and her husband for years, and was highly regarded [illegible] and good judgment, and this fact, coupled with the fact that he was a large investor in the stock of the company, influenced the husband and her daughter to buy stock. The first certificate [illegible] appellant was dated June 7, 1917, the second August [illegible], 1917, and the third March 1, 1918. Shortly after the [illegible] ment on the sale of securities, [illegible] Liberty Loan, [illegible] granted by The Central Issues Committee. Furthermore [illegible] of preferred stock was granted in June, 1918, on condition that they were

sold to the stockholders, and the proceeds would not be available until a minmum of $300,000.00 had been sold. This stock was offered pro-rata to the stockholders, and the directors subscribed their proportion, which stock was not to be re-sold but was to be held in escrow until the end of the war. At least $300,000.00 of stock had to be subscribed in order to finance the completion of the ratings. Subscriptions were secured for the required amount, but many of the subscribers settled by notes, and due to war conditions, many of these notes, as well as notes previously taken, remained unpaid. In August, 1919, the company was unable to meet its obligations, was forded into bankruptcy, and its assets were sold for $35,100.00.

The declaration consisted of three counts, all substantially alike, except that they relate to the separate purchases. Each count alleged in substance, that in the spring of 1913, the appellee, who owned stock in the United Mercantile Agency, then bankrupt, entered into a conspiracy with others and organized, under the laws of South Dakota, a corporation known as the United Agency, for the purpose of carrying on a mercantile rating and reporting agency as the successor of the United Mercantile Agency; that the stock of the United Agency consisted of 300,000 shares of $10.00 each, and in pursuance of the conspiracy, the assets of the United Mercantile Agency were bought at the bankruptcy sale for $20,500.00, and the United Agency contracted to issue $1,500,000.00 of its capital stock in exchange for the $20,500.00 of assets, and thereafter issued the stock to the appellant and others for $1.00 per share as fully paid up stock; that from time to time thereafter, the United Agency issued financial statements setting forth grossly extragagant and false figures as to its assets and surplus; that at no time during the existence of the corporation did its assets exceed $50,000 and there was no surplus; that statements were made that the value of the stock was $15.00 per share at the time of the organization in 1913, and from time to time thereafter during the period of six years, the stock was given a value of from $15.00 to $23.50 per share; that the stock was worthless

sold to the stockholders, and the proceeds would not be available until a minimum of $300,000.00 had been sold. This stock was offered pro-rata to the stockholders, and the directors subscribed their proportion, which stock was not to be re-sold but was to be held in escrow until the end of the war. At least $300,000.00 of stock had to be subscribed in order to finance the completion of the refinery. Subscriptions were secured for the required amount, but many of the subscribers settled by notes, and due to war conditions, many of these notes, as well as notes previously taken, remained unpaid. In August, 1919, the company was unable to meet its obligations, was forced into bankruptcy, and its assets were sold for $33,100.00.

The declaration consisted of three counts, all substantially alike, except that they relate to the separate occurrences. Each count alleged in substance, that in the spring of 1918, the appellee, who owned stock in the United Mercantile Agency, then bankrupt, entered into a conspiracy with others and organized, under the laws of South Dakota, a corporation known as the United Agency, for the purpose of carrying on a mercantile rating and reporting agency as the successor of the United Mercantile Agency; that the stock of the United Agency consisted of 300,000 shares of $10.00 each, and in pursuance of the conspiracy, the assets of the United Mercantile Agency were bought at the bankruptcy sale for $40,000.00, and the United Agency contracted to issue $1,500,000.00 of its capital stock in exchange for the $40,000.00 of assets, and thereafter issued the stock to the conspirators and others for $1.00 per share as fully paid up stock; that from time to time thereafter, the United Agency issued financial statements setting forth grossly extravagant and false figures as to its assets and earnings; that at no time during the existence of the corporation did its assets exceed $5,000.00 and there was no surplus; that statements were made that the value of the stock was $18.00 per share at the time of the organization in 1918, and from time to time thereafter during the period of six years, the stock was given a value of from $18.00 to $44.00 per share; that the stock was worthless

at all times; that the officers and agents of the corporation represented it to be solvent, whereas it was insolvent; that each financial statment was made so as to show a better financial condition and a greater value of its stock than each preceding statement, and this was done to sell stock and to conceal the actual condition of the corporation; that it was represented that the corporation was successfully established in business, when at all times it was totally insolvent, and would, at no time, have been able to proceed with its business except for the money raised from the sale of stock by means of the various frauds committed in pursuance of the conspiracy; that it was represented that the amounts of assets and surplus were based upon actual appraisements by appraisers of high standing, when in fact the very reports referred to did not purport to give any appraisement of the assets but stated that no appraisem nt had been attempted; that from May, 1913, to August, 1919, appellee was a director of the corporation and knew that all the representations stated in the declar tion were false, and he actually participated in the furtherance of the conspiracy and in the perpetration of the fraud; that all of the representations were made to appellant pursuant to the conspiracy, and she purchased her stock in reliance upon these representations, believing them to be true and without knowledge of their falsity.

In determining whether the trial court properly directed a verdict in favor of the appellee, it is not necessary for us to weigh the evidence and determine whether or not a conspiracy did exist, or whether false representations were in fact made by the directors, officers or agents of the corporation. All that is necessary for us to determine is whether there was evidence in the record fairly tending to support the charges in the declaration. If there was such evidence fairly tending to support the charges in the declaration, ~~If there was such evidence fairly~~ then the court improperly directed a verdict in favor of the appellee. If there was no such evidence, then the ruling of the court was correct. Frazer v.

at all times; that [illegible] it to be [illegible] was made so as to show a better [illegible] of its stock [illegible] stock and to conceal the [illegible] was represented that the [illegible] business, when at [illegible] money raised from the [illegible] committed in misuse of the [illegible] the amounts of assets and [illegible] by appraisers of high [illegible] to did not [illegible] that no [illegible] August, 1913. [illegible] all the representations [illegible] actually participated in the [illegible] perpetration of the fraud; [illegible] appellant [illegible] to the [illegible] influence upon these [illegible] knowledge [illegible].

In determining whether [illegible] in favor of the [illegible] and determine whether [illegible] conspiracy [illegible] cooperation. All that is necessary [illegible] was evidence in the record [illegible] deprivation. If there was such [illegible] charges in the indictment, [illegible] court improperly directed a verdict in favor of [illegible] was no such evidence, that the [illegible].

Howe, 106 Ill. 653; Illinois Central Railroad Co. v. Bailey, 222Ill. 480; Helm v. Illinois Commercial Men's Assn. 279 Ill. 570.

The evidence tends to show that appellee attended the first meeting of the incorporators of the corporation and subscribed to its stock; that he was a director from July, 1913, to August, 1919, that he was a member of the executive committee of the board of directors from October 12, 1915, to July 1918; that he was present at practically every meeting of the board of directors; that for at least three years he was one of the five managing directors; that he actively participated in the action of the board of directors in raising the price of stock, either by making a motion, or by seconding a motion to make such increase and that he actively engaged in all of the business of the corporation.

The evidence also tends to show that the assets of the United Merdantile Agency were purchased at bankruptcy sale by a committee of stockholders for $22,500.00, and within a few days thereafter the United Agency was organized, whereupon these assets were turned over to the new corporations for certain shares of stock.. The first charge of fraud and conspiracy is based upon this transfer, appellant claiming that the assets turned over, had no such value as was placed upon them, and that this transaction was the basis of a large part of the assets of the corporation afterwards listed and sent out to the prospective purchasers of stock. Ryerson v. Peden, 303 Ill. 171, was a case in which the cause of action was not like this, but some of the facts were quite similar to the facts here presented, and on page 175 it was said: "Payment for capital stock with property is no payment except to the extent of the true value of the property, and if the property is taken at an over-valuation the stockholders are liable to make up the deficiency; and when a failure occurs in the business, the law puts upon the persons who disposed of the assets of a former company to pay for the capital stock of the new company the burden of showing that the property so turned over equaled the value of the capital stock for which it was considered to be paid." In the case at bar there was ample ground for dispute as to the value of

Howe, 106 Ill. 655; Illinois Central [illegible] v. Bailey, [illegible]
480; Holm v. Illinois Commercial [illegible], 119 Ill. 270.

The evidence tends to show that [illegible] treated the first meeting of the incorporators of the [illegible] stock; that he was a director from [illegible], 1901, to August, 1902, that he was a member of the executive committee [illegible] director from October 16, 1902, to July 1903; that [illegible] every meeting of the board of directors [illegible] he was one of the five managing directors, that he actively participated in the action of the board of directors in raising [illegible] either by making a [illegible] tion, or by [illegible] and that he actively participated [illegible] of the [illegible].

The evidence also tends to [illegible] the [illegible] Agency were [illegible] $22,500.00, and within a few days [illegible] lied, wherever [illegible] for certain shares of stock. [illegible] is based upon this [illegible] over, had no [illegible] tion was the basis [illegible] afterwards [illegible] Bywater v. [illegible], 304 [illegible] was not like this, but [illegible] here presented, and [illegible] with property is [illegible] the property, and if [illegible] stockholders are liable [illegible] occurs in the [illegible] the assets of a foreign [illegible] company the burden of showing that the property [illegible] the value of the capital [illegible] In the case at bar there was [illegible] and [illegible] the value of

the assets turned over to the United Agency, the business engaged in was the furnishing of the ratings for the whole United States similar to those furnished by Dunn and Bradstreet. The collection of these ratings involved vast labor and large sums of money. After these ratings were collected, they were of no value except to a corporation equipped to use them. At a forced sale there would be few bidders for such property, and the property would naturally bring very little money, but to a corporation equipped to utilize the ratings in their business, they might be of considerable value. Appellee claims their value was established by public accountants, but the evidence on this point is in conflict. In this condition of the record, their value was a question of fact for the jury, and it was for the jury to say whether, under all the evidence, they were worth the stock issued for them, and whether the stockholders who received this stock, paid full value for it. It was also a question of fact for the jury to determine whether these assets were listed by the corporation at such an amount as constituted a fraud upon the persons who purchased the stock of the corporation.

The next question for determination is whether there was any evidence fairly tending to show that after the United Agency was organized and began to sell stock, the appellee and his fellow directors and the other officers were guilty of the conspiracy and fraud alleged in the declaration. The evidende tends to show that at irregular intervals from November 30, 1913, to December 31, 1918, twelve balance sheets were issued and used by the salesmen in the sale of stock..Each sheet showed a substantial increase in the assets, liabilities, (except capital stock) and surplus. On November 30, 1913, within six months of the organization of this corporation, the balance sheets showed an income account of $66,770.68, operating and general expenses of $41,692. 11, reserve for uncompleted contract of $10,572.00, leaving a net of $14,560.57. It also showed assets of $1,536,992. 86. liabilities of $18,825.57, and a surplus of $790,766.46. These amounts were increased in each balance

the assets turned over to the Land Agent, the land [illegible] the forfeiting of the [illegible] those formerly [illegible] and [illegible] [illegible] collected, they were [illegible] use them. As a rule [illegible] property, and the [illegible] to a corporation, and [illegible] they might be of [illegible] established by public [illegible] opinion. In [illegible] fact for the [illegible] evidence, they were [illegible] stockholders [illegible] made a [illegible] were filled by [illegible] upon the persons who [illegible]

The fact [illegible] evidence fairly [illegible] land and [illegible] the other [illegible] [illegible] No other [illegible] lumber and [illegible] a [illegible] and [illegible] [illegible] [illegible] recognized [illegible] also showed assets [illegible] a surplus of $750,000. [illegible]

sheet until December 31, 1918, when the assets were listed at $3,913,329.17 the liabilities at $148,965.37, and the surplus at $1, 929,887.03. The increased surplus came from the sale of stock and not from profits earned by the corporation.

In January, 1916, the directors had an appraisal of the rating book and special report files made, which purported to show a value of $2,447,517.60, being $956,355.98 above what the rating book and special report files were then carrying upon the books of the corporation. Thereafter, upon authority of the board of directors, and based upon the alleged appraisal, $1,069, 819.42 was gradually added to the plant account and surplus. $325,000.00 of this amount was added to the plant account in December, 1915, and in March, 1916, $155,000.00 was added and in December, 1916, two items of $250,000.00 and $339,819.42 were added from the same source and in the same way. After each increase in the plant and surplus account the directors, at meetings which were attended by the appellee, fixed the price of the stock. They commenced in 1913 at $5.00 per share and followed this up at later periods with prices as high as $23.50, the latter being the price of the stock when the corporation went into bankruptcy in September, 1919.

The report of the president to the directors and stockholders dated January 14, 1914, stated that the corporation started with ten or twelve employees, with no live business on the books, but the business had developed with remarkable rapidity; that the working force then numbered about seventy people, with additional offices in outside cities; that the corporation voluntarily fulfilled the contracts for service which the United Mercantile Agency had taken and for which it had received the money in advance and failed to perform the service.

As tending to support the allegations of fraud, many exhibits were introduced in evidence by the appellant containing statements relative to the assets and financial standing of this corporation. It will be impossible to refer to all of them, but we have selected a few which present the general statements as made by the officers. Exhibit 69,

sheet until December 31, 1916. Now the assets [illegible] at $2,[illegible],[illegible].17 the liabilities at $148,[illegible].37, and the surplus at $1,[illegible],[illegible].00. The increased surplus came from the sale of stock and not from profits earned by the corporation.

In January, 1916, the directors had an examinant of the rating [illegible] and special report filed made, which reported to show a value of $2,447,317.00, being $[illegible],[illegible].00 above what the rating [illegible] and special report filed were then carrying upon the books of the corporation.

Thereafter, upon authority of the board of directors, [illegible] upon the alleged appraisal, $1,000,[illegible] [illegible] added to the plant account and surplus. $[illegible],000.00 of this amount was added to the plant account in December, 1916, and in March, 1917, $[illegible],000.00 was added and in December, 1916, two items of $[illegible],000.00 and $[illegible] were added from the same source and in the same way. After such increase in the plant and surplus account the directors, at [illegible] attended by the appellee, fixed the price of the stock. They [illegible] in 1913 at $[illegible].00 per share and had [illegible] prices as high as $[illegible].50, the latter being the [illegible] the stock when the corporation went into bankruptcy in September, 1916.

The report of the [illegible] the direct[illegible] dated January 14, 1916, [illegible] that the [illegible] or twelve employees, with [illegible] business had developed with [illegible] than numbered about a very [illegible] office; that the corporation [illegible] service which the United States [illegible] it had received the money [illegible] the [illegible].

[illegible] tending to support the [illegible] introduced in evidence by the [illegible] to the assets and financial [illegible] impossible to refer to all of them, but we have selected a few which present the general statement made by the officers. Exhibit 59,

which was without date, contained the statement that the corporation afforded an investment with every element of permanency and safety and free from any inherent elements of weakness; that the corporation was the most agressive agency in the field; that it had assets which cost over $4,500,000.00 was fully equipped, in active operation, and enjoying a consistent and ever increasing growth in its v lume of business; that the organization was without any watered stock or debts; that the officers and directors were men of known business ability and high integrity; that for a limited time the public could procure some of the stock. Exhibit 74 stated that the corporation holds the record for safety, permanency and earning power; that in quality of service it already ranks above either of the old concerns; that it was operating on a satisfactory basis; that when the ratings are completed it will make a very decided increase in earnings, together with a marked advance in the value of the stock; that it is as stable as the Rock of Ages, as permanent as business itself, and is profitable far above the average business enterprise; that it has $1,750,000.00 in actual assets and every dollar in stock issued will be backed by $2.00 of assets; that its earning capacity is so far above any ordinary investment that no comparison is possible. Exhibit 75, which was a selling talk for salesmen, stated that the business the corporation was doing more than paid the operating expenses; that it had assets of more than $2,000,000.00; that the preliminary work was finished and the big profits would begin to come in; that it was firmly established on a good sound basis; that every share of stock issued had been paid for in full; that on 100,000 subscribers it would have an income from contracts alone of over $10,000,000.00, and as the income from the banks and attorneys alone ought to be sufficient to pay all expenses, the $10,000,000.00 should be clear profit available for dividends; that there was no chance for the stockholders being frozen out; that there was no promotion stock and nobody could get control of the corporation; that the profits will be big so there will be plenty for all. Exhibit 82 stat-

which was without date, commenced the statement that the corporation afforded an investment with every element of permanency and safety and free from any inherent elements of weakness; that the corporation was the most effective agency in the field; that it had assets which cost over $4,300,000.00 was fully equipped, in better condition, and employing a competent and ever increasing growth in its area of business; that the organization was without any watered stock or debts; that its officers and directors were men of known business ability and high integrity; that for a limited time the public could receive some of the stock. Exhibit 74 stated that the corporation holds the record for safety, permanency and earning power; that in quality of business it stands rank above either of the old concerns; that it was operating on a satisfactory basis; that when the rates are completed it will make a very decided increase in earnings, [illegible] the value of the stock; that it is [illegible] permanent as business itself, [illegible] business enterprise; that it has $1,750,000.00 in [illegible] assets and every dollar in stock issued will be backed by $2.00 of assets; that its earning capacity is so far [illegible] that its composition is sound. [illegible], which was [illegible] enclosure, stated that the [illegible] than paid the [illegible] $2,000,000.00; that the preferred [illegible] profits would begin to come in; that it was [illegible] good sound basis; that every share of stock [illegible] in full; that on 100,000 subscribers it would have an income from contracts alone of over $10,000,000.00, and as the [illegible] banks and attorneys [illegible] to be satisfactory [illegible] the $10,000,000.00 should be clear profit available [illegible] there was no chance for the stockholders [illegible] no promotion stock and nobody could get [illegible] the profits will be big as there will be plenty for all. [illegible]

ed that the history of the corporation is a history of one of the greatest achievments of American business life. It holds the record for safety, permanency and earning power; that its progress has been remarkable; that it is already doing a splendid business and showing a consistent growth from month to month; that there is, at a low estimate, $1,000,000.00 worth of business awaiting the completion of the rating book; that it is showing a very satisfactory profit; that the element of risk is negligible; that the business is not affected by floods, fires, earthquakes and panics.

There was evidence tending to show that The National Advisory Bureau was controlled by the officers of this corporation, and one of the sales agents conducted such reporting concern from another office; that salesmen were instructed to tell prospective stock purchasers to write to the National Advisory Bureau for information about the United Agency; that such inquiries were received by the agent of the corporation and information prepared in advance was sent to those seeking information; that Morris, who was a stock salesman and who sold the stock to the appellant, was the National Advisory Bureau for a part of this time.

In the summer of 1917, before the purchase by appellant of 513 shares of the stock in question, Dr. W. M. Avery, who roomed and boarded at the Case home, after discussing with Mrs. Case and her daughter the advisability of consulting the appellee before buying any more stock, went to the appellee's home and there had a conversation relative to the financial condition and prospects of the corporation. Dr. Avery testified that he told appellee that appellant was thinking of investing in more stock, and appellee stated that the corporation was the best investment he knew of, and he went into detail regarding its financial condition. This conversation was repeated by Dr. Avery to the appellant, and 513 shares of stock were purchased a few weeks later. The appellant, who is seventy-five years old, testified that she talked with appellee at the office of the corporation in Chicago and asked him what he thought about the corporation and he replied that he thought it

ed that the history of the corporation is a history of one of the greatest achievements of American business life. It made the records for safety, conservancy and earning power; that its progress has been remarkable; that it is already doing a colossal business and showing a consistent growth from month to month; that there is, at a low estimate, $1,000,000.00 worth of business awaiting the completion of the rating book; that it is showing a very satisfactory profit; that the element of risk is negligible; that the business is not affected by floods, fires, earthquakes and panics.

There was evidence tending to show that the National Advisory Bureau was controlled by the officers of this corporation, that one of the sales agents conducted such reporting concern from another office; that salesmen were instructed to tell prospective stock purchasers to write to the National Advisory Bureau for information about the United Agency; that such inquiries were received by the agent of the corporation and information procured in advance was sent in to see such inquiries; that Morris, who was a stock salesman and who sold the stock to the appellant, was the National Advisory Bureau for a part of this time.

In the summer of 1917, before the purchase by appellant of 316 shares of the stock in question, Dr. H. M. Avery, who resided and practiced at the Oase hotel, after discussing with his daughter the advisability of selling the property before buying any more stock, went to the appellee's home and there had a conversation relative to the financial condition and prospects of the corporation. Dr. Avery testified that he told appellee that somebody was thinking of putting in more stock, and appellee stated that the corporation was in good investment condition, and he could not see any reason why it was in financial condition. This conversation was recalled by Dr. Avery to the appellant, and 316 shares of stock were purchased at the instance of the appellant, who is seventy-five years old, illiterate, but can read and write. With appellee at the office of the corporation in Chicago, and asked him what he thought about the corporation and he replied that he thought it

was a fine thing and that it was a good investment for any one who had any surplus money.

We have only recited a portion of the principal facts which appear in evidence concerning this transaction. The fraud charged is that $22,500.00 worth of property was listed as $1,500,000.00 of assets; that false statements were made that the stock was fully paid; that the 3500 stockholders of the United Mercantile Agency did not pay full value for their stock; that grossly extravagant and false statements were issued as to the assets, liabilities and surplus, whereas the total assets were not worth to exceed, $50,000,00, there was no surplus, the stock was worthless, and the corporation insolvent; that the corporation never was operated on a satisfactory basis and never had any earnings in excess of expenses; that every dollar of stock was not backed by two dollars of assets; that the officers and directors, including appellee, knew all of these representations were false and made them for the purpose of selling stock.

It may be true that some of these statements might be classified as legitimate puffings of the business, but that is not true of all of them. Some of them contain positive statements of fact which the evidence tends to show were not true and were calculated to mislead and deceive. It may also be true that the officers and directors were trying to establish a legitimate business, very extensive in character, which if established would possess vast earning powers, and that they were prevented from so doing by circumstances over which they had no control, but this fact would not justify them in sending out statements which were known by them to be untrue and which were calculated to mislead and deceive prospective purchasers of stock to their financial disadvantage. The evidence tends to show that appellee's relations with the corporation and its officers and directors were such that he could and should have known of its true condition. Within a short time after these reports of the assets and business were made, the corporation became bankrupt and its total assets were sold for $35,100.00.

was a fine thing and that it was a good investment for any one who had any surplus money.

We have only recited a portion of the principal facts which appear in evidence concerning this transaction. The fraud charged is that $22,500.00 worth of property was listed as $3,500,000.00 of assets; that false statements were made that no stock was fully paid; that the 3500 stockholders of the United Mercantile Agency did not pay full value for their stock; that grossly extravagant and false statements were issued as to the assets, liabilities and surplus, whereas the total assets were not worth to exceed, $500,000.00, there was no surplus, the stock was worthless, and the corporation insolvent; that the corporation never was operated on a satisfactory basis and never had any earnings in excess of expenses; that every dollar of stock was not backed by two dollars of assets; that the officers and directors, including appellee, knew all of these representations were false and made them for the purpose of selling stock.

It may be true that some of these statements might be classified as legitimate puffings of the business, but that is not true of all of them. Some of them contain positive misstatements of fact which the evidence tends to show were not true and were calculated to mislead and deceive. It may also be true that the officers and directors were trying to establish a legitimate business, very extensive in character, which if established would possess vast earning powers, and that they were encouraged from so doing by circumstances over which they had no control, but this fact would not justify them in putting out statements which were known by them to be untrue and which were calculated to mislead and deceive purchasers of stock in their financial standing. The evidence tends to show that appellee's relations with the corporation and its officers and directors were such that he could and should have known of its true condition. Within a short time after these reports of the assets and business were made, the corporation became bankrupt and its total assets were sold for $32,100.00.

It is not for this court to say whether this evidence sustained the allegation of the declaration charging a fraud and conspiracy, but all that it is necessary for us to determine is whether there was evidence fairly tending to support the charge of fraud and conspiracy. From a careful consideration of all this evidence we are of the opinion that there was evidence fairly tending to support the averments of the declaration; that whether this evidence showed fraud and conspiracy was a question of fact for the jury to determine, and that the jury should have been permitted to determine this question; that for this reason the court should have submitted the case to the jury and was in error in directing a verdict for appellee.

For the errors indicated, the judgment will be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

Reversed and remanded.

It is not for this court to say whether this evidence sustained the allegation of the indictment charging a fraud and conspiracy, but all that it is necessary for us to do is to ascertain whether there was evidence fairly tending to support the charge of fraud and conspiracy. From a careful consideration of all the evidence we are of the opinion that there was evidence fairly tending to support the prosecution's contention; that whether this evidence showed fraud and a conspiracy was a question of fact for the jury to determine, and that the jury should have been permitted to determine this question; that for this reason the court should have submitted the case to the jury and was in error in directing a verdict for appellee.

For the errors indicated, the judgment will be reversed and the cause remanded for further proceedings in accordance with the views above expressed.

Reversed and remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 15th day of Jan in the year of our Lord one thousand nine hundred and twenty-three.

Justus L. Johnson

Clerk of the Appellate Court.

7065 (2444)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 163

BE IT REMEMBERED, that afterwards, to-wit: on OCT 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

William Pentland, appellee,

vs. Appeal from Whiteside

Mathis Brothers & Company,

appellant,

Partlow, J.

William Pentland is a retired farmer and in June, 1920, had oats on a farm occupied by a tenant. He wished to remove the oats to make way for the new oats. Mathis Brothers & Company, a corporation, had elevators in different parts of the surrounding country, one of which was at the village of Hooppole. Roy Mathis was the manager of the elevator at Hooppole. On June 20 or 21, Pentland went to that elevator. He claims he sold the manager his oats at $1.00 per bushel. On June 25 he delivered 1235 bushels to the company. It was placed in a separate bin and that amount of oats, either the same oats or others of like kind and character, were kept therein by the company up to the trial of this suit. The company claimed that it offered Pentland $1.00 per bushel at his first visit and that he refused to sell at that price but arranged to store the oats. Long afterwards he demanded $1.00 per bushel and they denied they had bought the oats, and offered him a much less sum as the price of oats had fallen much lower. On September 7, 1921, Pentland brought this action of assumpsit against the Company and filed the common counts. Defendant filed the general issue. The case was tried by a jury and there was a verdict for plaintiff for $1,235.00. A motion by defendant for a new trial was denied. Plaintiff had judgment. Defendant appeals.

Plaintiff alone testified in support of his contention. He was contradicted by the manager at Hooppole and a bookkeeper in the office, both of whom testified that Pentland positively refused to sell at the price offered. The bookkeeper testified to a conversation with Pentland a couple of months later which plainly indicated that he had not yet sold the oats. There was another witness to statements still later by Pentland indicating that he had not yet sold his oats. In Donelson

William Pentland, appellee,

vs. Appeal from Whiteside

Mathis Brothers & Company,

appellant.

Partlow, J.

William Pentland is a retired farmer and in June, 1920, had oats on a farm occupied by a tenant. He wished to remove the oats to make way for the new oats. Mathis Brothers & Company, a corporation, had elevators in different parts of the surrounding country, one of which was at the village of Hooppole. Roy Mathis was the manager of the elevator at Hooppole. On June 30 or 31, Pentland went to that elevator. He claims he sold the manager his oats at $1.00 per bushel. On June 25 he delivered 1835 bushels to the company. It was placed in a separate bin and that amount of oats, either the same oats or others of like kind and character, were kept therein by the company up to the trial of this suit. The company claimed that it offered Pentland $1.00 per bushel at his first visit and that he refused to sell at that price but arranged to store the oats. Long afterwards he demanded $1.00 per bushel and they denied they had bought the oats, and offered him a much less sum as the price of oats had fallen much lower. On September 7, 1921, Pentland brought this action of assumpsit against the Company and filed the common counts. Defendant filed the general issue. The case was tried by a jury and there was a verdict for plaintiff for $1,835.00. A motion by defendant for a new trial was denied. Plaintiff had judgment. Defendant appeals.

Plaintiff alone testified in support of his contention. He was contradicted by the manager at Hooppole and a bookkeeper in the office, both of whom testified that Pentland positively refused to sell at the price offered. The bookkeeper testified to a conversation with Pentland a couple of months later which plainly indicated that he had not yet sold the oats. There was another witness to statements still later by Pentland indicating that he had not yet sold his oats. In Donelson

v. E. St. L. Ry. Co., 235 Ill. 625, the court said: "The constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of the evidence, and if a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." Other cases are there cited which sustain that position and a quotation to the like effect is made in Bradley v. Palmer, 193 Ill. 15, on page 90. This verdict is so clearly against the weight of the evidence that in our opinion a new trial should have been granted.

The first instruction given for plaintiff was as follows: "This case is to be decided solely on what was said or agreed upon between plaintiff and the agent of the defendant during the month of June, 1920." That statement is literally true, for if plaintiff ever sold his oats to defendant, it was in June, 1920. Yet it was calculated to mislead the jury in this case. There was considerable evidence of statements made by plaintiff long after June, 1920, which tended to show that he had not sold the oats in June, 1920. This instruction might easily be understood by the jury to mean that they were to consider solely what was said between the parties in June, and to disregard the proof of what plaintiff said afterwards.

The judgment is reversed and the cause remanded.

v. K. St. L. Ry. Co., 20 Ill. App. 1, the court said: "The constitution, which provides that the right of trial by jury as previously enjoyed shall remain inviolate, does not make the jury the final judges of the weight of the evidence, and if a verdict is manifestly against the weight of the evidence it is the duty of the trial judge to set it aside and grant a new trial, and a failure to do so is error, for which a judgment must be reversed." Other cases are there cited for such that position and a quotation to the like effect is made in Bradley v. Palmer, 150 Ill. 18, on page 30. This verdict is so clearly against the weight of the evidence that in our opinion a new trial should have been granted.

The first instruction given for plaintiff was as follows: "This case is to be decided solely on what was said or agreed upon between plaintiff and the agent of the defendant during the month of June, 1920." That statement is literally true, for if plaintiff ever told his story to defendant, it was in June, 1920. If it was calculated to mislead the jury in this case. There was conceded really evidence of statements made by plaintiff long after June, 1920, which tended to show that he had not sold the oats in June, 1920. This instruction might easily be misconstrued by the jury to mean that they were to consider solely what was said between the parties in June, and to disregard the proof of what plaintiff said afterwards.

The judgment is reversed and the cause remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

7070

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 614

BE IT REMEMBERED, that afterwards, to-wit: on OCT 1 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

C. E. Harrington, appellant,

vs. Appeal from Lee

Julius Lepley, appellee ,

Partlow, J.

Harrington brought replevin against Lepley to recover possession of 25 hogs. The declaration charged in one count that defendant took and unjustly detained said hogs, the property of plaintiff, and in a second count that defendant unjustly detained said hogs, the property of plaintiff. Defendant pleaded (1) non cepit; (2) non detinet; and (3) that said chattels were the property of defendant and not of the plaintiff. The parties did not form a written issue on said third plea, but went to trial voluntarily, and thereby formed an oral issue. Strohm v. Hayes, 80 Ill. 41; First Nat. Bank v. Miller, 235 Ill. 135; Supreme Court of Honor v. Barker, 96 Ill. App. 490. Under said third plea the question is whether plaintiff had the right of possession; and plaintiff must recover on the strength of his own right of possession, and the burden is on him to establish it. Reynolds v. McCormick, 62 Ill. 412; Constantine v. Foster, 57 Ill. 36; Chandler v. Lincoln, 52 Ill. 74; Pease v. Ditto, 189 Ill. 456. Defendant had judgment on a directed verdict and plaintiff appeals. The litigated question is whether plaintiff was entitled to the possession of the hogs, as against defendant, when he brought this suit.

Plaintiff was landlord and defendant was tenant under a written lease for a term originally expiring March 1, 1920, but which was extended to March 1, 1921. The lease required defendant to deliver to plaintiff as rent for the land demised, one half of certain specified products of the farm, including hogs. One paragraph of the lease was as follows:

> "At the termination of this lease, the property owned jointly by the parties hereto shall be equally divided between said parties in the manner following, to-wit: Party of the second part shall divide such joint property into two lots and party of the first part shall have the right to take as his share either lot he may see fit, and party of the second part shall take the lot remaining after such selection, which shall be final as regards the division of the property owned jointly."

C. F. Harrington, appellant,

vs. Appeal from Lee

Julius Lepley, appellee.

Partlow, J.

Harrington brought replevin against Lepley to recover possession of 25 hogs. The declaration charged in one count that defendant took and unjustly detained said hogs, the property of plaintiff, and in a second count that defendant unjustly detained said hogs, the property of plaintiff. Defendant pleaded (1) non cepit; (2) non detinet; and (3) that said chattels were the property of defendant and not of the plaintiff. The parties did not for a written lease on said third plea, but went to trial voluntarily, and thereby formed an oral lease. Strohm v. Hayes, 80 Ill. 41; First Nat. Bank v. Miller, 235 Ill. 185; Supreme Court of Honor v. Barker, 98 Ill. App. 480. Under said third plea the question is whether plaintiff had the right of possession; and plaintiff must recover on the strength of his own right of possession, and the burden is on him to establish it. Reynolds v. McCormick, 3 Ill. 412; Constantine v. Foster, 57 Ill. 36; Chandler v. Lincoln, 58 Ill. 74; Pease v. Ditto, 185 Ill. 456; Defendant had judgment on a directed verdict and plaintiff appeals. The litigated question is whether plaintiff was entitled to the possession of the hogs, as against defendant, when he brought this suit.

Plaintiff was landlord and defendant was tenant under a written lease for a term originally expiring March 1, 1930, but which was extended to March 1, 1931. The lease required defendant to deliver to plaintiff as rent for the land demised, one half of certain specified products of the farm, including hogs. One paragraph of the lease was as follows:

> "At the termination of this lease, the property owned jointly by the parties hereto shall be equally divided between said parties in the manner following, to-wit: Party of the second part shall divide such joint property into two lots and party of the first part shall have the right to take at his share either lot he may see fit, and party of the second part shall take the lot remaining after such selection, which shall be final as regards the division of the property owned jointly."

Another paragraph began. "All sales of personal property so owned jointly shall be by said first party."

The lease was to expire on March 1, 1921. This suit was begun on February 24, 1921. At that time, if any one was entitled to the exclusive possession of these hogs then on the farm, it was the tenant and not the landlord. The fact that any sale of the joint property was to be made by the landlord, did not mean that the landlord could sell any of the joint property at any time at his own pleasure without the consent of the tenant, and could take any such property into his exclusive possession at any time for the purpose of selling it, without the consent of the tenant. The land had been let to another tenant for a term beginning March 1, 1921, and Lepley had rented another farm which he was to occupy on March 1, 1921, The parties had divided practically all of the other property before February 24, 1921, when this suit was brought. The tenant had, as the lease provided, divided different kinds of the joint property into two parcels and the landlord had exercised his choise as to which parcel he would select. In one case the landlord made the division and also the choice. The tenant wished the hogs so divided, and intended to remove to his new farm the parcel which the landlord did not select. The tenant made a division of the hogs several times, but the landlord refused to make his selection. We are of opinion that the lease did not give the landlord the right to sell the joint personal property, or any part of it, at will, and thus deprive the tenant of his right to keep the half which the landlord did not select under the provisions above quoted. The fact that all the rest of the joint property had already been so divided was not improperly admitted in evidence, as it tended to show that the parties had decided to divide the property in the manner provided by the lease. No attempt had been made to sell any of the other property. Obviously the property could not be divided on the very last day of February and the tenant's portions removed that night to his new farm, which was several miles distant. Obviously the division and removal would

Another paragraph began. "All sales of personal property so owned jointly shall be by said first party."

The lease was to expire on March 1, 1931. This suit was begun on February 24, 1931. At that time, if any one was entitled to the exclusive possession of these hogs then on the farm, it was the tenant and not the landlord. The fact that any sale of the joint property was to be made by the landlord, did not mean that the landlord could sell any of the joint property at any time at his own pleasure without the consent of the tenant, and could take any such property into his exclusive possession at any time for the purpose of selling it, without the consent of the tenant. The land had been let to another tenant for a term beginning March 1, 1931, and Copley had rented another farm which he was to occupy on March 1, 1931. The parties had divided practically all of the other property before February 24, 1931, when this suit was brought. The tenant had, as the lease provided, divided different kinds of the joint property into two parcels and the landlord had exercised his choice as to which parcel he would select. In one case the landlord made the division and also the choice. The tenant wished the hogs so divided, and intended to remove to his new farm the parcel which the landlord did not select. The tenant made a division of the hogs several times, but the landlord refused to make his selection. We are of opinion that the lease did not give the landlord the right to sell the joint personal property, or any part of it, at will, and thus deprive the tenant of his right to keep the half which the landlord did not select under the provisions above quoted. The fact that all the rest of the joint property had already been so divided was not improperly admitted in evidence, as it tended to show that the parties had decided to divide the property in the manner provided by the lease. No attempt had been made to sell any of the other property. Obviously the property could not be divided on the very last day of February and the tenant's portions removed that night to his new farm, which was several miles distant. Obviously the division and removal would

require a considerable part of February. We think it is not necessary to determine what legal term best describes the interests of these parties in these hogs. We only hold that the landlord did not have the exclusive right to determine that they should be sold, and did not have the exclusive right to their possession, and that when he brought this suit he did not have the legal right to replevin the hogs from the tenant.

The judgment is therefore affirmed.

require a considerable part of February. We think it is not necessary to determine what legal term best describes the interests of these parties in these hogs. We only hold that the landlord did not have the exclusive right to determine that they should be sold, and did not have the exclusive right to their possession, and that when he brought this suit he did not have the legal right to replevin the hogs from the tenant.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

6934
P.H. denied per 20-1923.

6934

(2617)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the [illegible] day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS N. DAVIS, Justice.
Hon. THOMAS M. TETT, Justice.
JESSE E. [illegible], Clerk.
CURT E. [illegible], Sheriff.

[illegible]

BE IT REMEMBERED, [illegible]

[illegible]

Clerk's office [illegible]

[illegible]

Claude H. Black, Etc., appellee,

vs. Appeal from McDonough

James E. Bennett, et al., appellants.

Per curiam.

On August 14, 1920, Claude H. Black, a minor, by his guardian and next friend, brought this action of assumpsit in the circuit court of McDonough County, against James E. Bennett and others, partners as James E. Bennett & Company, and Sid C. Fluegel. Summons was serve upon the members of the firm of James E. Bennett & Company in Cook County and on Fluegel in McDonough County. A declaration was filed, with an affidavit of claim. The defendants served in Cook County filed a plea, which they call a plea to the jurisdiction in the nature of a plea in abatement. Plaintiff filed a replication thereto. Afterwards, on motion of plaintiff, said plea was stricken from the files and a repleader ordered by a certain day. On the day named said Chicago defendants elected to stand by their former plea, and they were defaulted. The plea in abatement and the action of the court thereon were preserved in a bill of exceptions. Fluegel filed four pleas, one the general issue, the second a denial that he was jointly liable with the said Chicago defendants, the third that the action did not accrue to the plaintiff within six months before the commencement of the suit, and the fourth, a similar plea to the third. To these pleas he attached an affidavit of merits. Issues were joined thereon. The cause was tried by a jury. Before the cause was tried plaintiff amended his affidavit of claim so as to claim only for two items accruing within six months prior to the commencement of the suit. Plaintiff had a verdict for $325.00. A motion by Fluegel for a new trial was denied. Plaintiff had judgment against all the defendants for $325.00. This appeal by the defendants is brought to this court by agreement. We affirmed the judgment, and afterwards granted a petition by all the defendants for a rehearing.

Claude H. Black, Etc., appellee,

vs. Appeal from McDonough

James E. Bennett, et al., appellants.

Per curiam.

On August 14, 1920, Claude H. Black, a minor, by his guardian and next friend, brought this action of assumpsit in the circuit court of McDonough County, against James E. Bennett and others, partners as James E. Bennett & Company, and Ed C. Finegel. Summons was serve upon the members of the firm of James E. Bennett & Company in Cook County and on Finegel in McDonough County. A declaration was filed, with an affidavit of claim. The defendants served in Cook County filed a plea, which they call a plea to the jurisdiction in the nature of a plea in abatement. Plaintiff filed a replication thereto. Afterwards, on motion of plaintiff, said plea was stricken from the files and a replender ordered by a certain day. On the day named said Chicago defendants elected to stand by their former plea, and they were defaulted. The plea in abatement and the action of the court thereon were preserved in a bill of exceptions. Finegel filed four pleas, one the general issue, the second a denial that he was jointly liable with the said Chicago defendants, the third that the action did not accrue to the plaintiff within six months before the commencement of the suit, and the fourth, a similar plea to the third. To these pleas he attached an affidavit of merits. Issues were joined thereon. The cause was tried by a jury. Before the cause was tried plaintiff amended his affidavit of claim so as to claim only for two items accruing within six months prior to the commencement of the suit. Plaintiff had a verdict for $2[illegible]5.00. A motion by Finegel for a new trial was denied. Plaintiff had judgment against all the defendants for $[illegible]25.00. This appeal by the defendants is brought to this court by agreement. We affirmed the judgment, and afterwards granted a petition by all the defendants for a rehearing.

The declaration alleges that the defendants were indebted to the plaintiff for money had and received by defendants for the use of the plaintiff, and that, being so indebted, they promised plaintiff to pay him said sum of money on request; yet, though requested, they have refused to pay it. The affidavit of claim stated that plaintiff's demand is for money had and received by the defendants to and for the plaintiff's use, being money lost between August 14, 1919, and May 14, 1920, on option contracts to buy and sell grain at future times, it being agreed by both parties thereto at the time of making such contracts that the options, when exercised, should be settled, not by receipt or delivery of such property, but by the payment only of differences in prices thereof, in which said several transactions the plaintiff made and delivered bank checks on which defendants received the money and which checks bore dates and are in the following amounts, (stating them) and that said sums were lost by plaintiff, and that there is due to plaintiff from defendants after allowing to defendants all their just credits, deductions and set-offs, $2, 775. 00. The amended affidavit of claim is similar, except that it was for money so lost within six months before the commencement of the suit, and two checks only were described, amounting to $325.00. A question arises as to the relation this affidavit bears to the declaration. In Healy v. Charnley, 79 ILL. 592, the court said that such an affidavit of claim, though no part of the declaration itself, was a pleading authorized by statute. In McKenzie v. Penfield, 87 Ill. 38, the court said: "Affidavits of this kind so far partake of the nature of pleadings that they must be dealt with on the same principles." In Kector Lumber Co. v. Thompson, 144 U.-S. 434, a case from Illinois, the court said that the affidavit, though no part of the declaration itself, was a statutory pleading. Allen v. Watt, 69 Ill. 655; Haggard v. Smith, 71 Ill. 226; Mayberry v. Van Horn, 83 Ill. 289 Henry v. Merian & Morgan Paraffine Co., 83 Ill. 461, are cases where it is held that the declaration is modified and restricted by the affidavit claim, and that such affidavit limits the issues to be tried. Therefore, while, under the declaration alone plaintiff could prove

The decisions adopt that the defendants are indebted to the plaintiff [illegible] had been received by defendants for the use of the plaintiff, and that, being so indebted, they [illegible] - tiff to pay him such sum of money [illegible], though [illegible], they have refused to pay it. The [illegible] that plaintiff's demand is for money had and received by the defendants for the plaintiff's use, being [illegible] 4, 1910, and [illegible] 1920, on behalf [illegible] being agreed by both [illegible] that the [illegible] delivery of such [illegible], [illegible] place thereof, [illegible] and delivered [illegible] which [illegible] and that said [illegible] plaintiff [illegible] credits, [illegible] of claim [illegible] courts before the [illegible] described, [illegible] this affidavit [illegible] 392, the [illegible] of the [illegible] McKenzie v. [illegible] kind to [illegible] with or the [illegible] 8. 484, a case [illegible] no part of the [illegible] [illegible] 92 Ill. 555; [illegible] 83 Ill. 295 [illegible] where it is held [illegible] affidavit claim, and [illegible] Therefore, while, under the decisions [illegible]

and recover for any sum of money which the defendants had and received to the use of the plaintiff to be paid on request, and which, though requested, they had not paid, yet under that declaration as limited by this affidavit plaintiff could only recover from defendants money lost within six months before the commencement of the suit in gambling in the price of grain, and then not to exceed $325.00. This therefore, is an action brought under Section 132 of the Criminal Code, which authorizes the loser to recover from the winner all sums so lost and to bring various forms of actions therefor, including assumpsit for money had and received.

Defendants contend that the plea in abatement was stricken from the files because no affidavit of merits was attached thereto. If that was the ground on which the plea was stricken, that ruling was erroneous, if we were right in holding, in American Spirits Mfg. Co. vs. Peoria Belt Ry. Co., 154 Ill. App. 330, that an affidavit of merits is not required to accompany a plea in abatement, though an affidavit of claim is attached to the declaration. Howe v. Thayer, 24 Ill. 246. Drake v. Drake, 183 Ill 526. But we do not interpret the ruling of the court. The motion as preserved in the bill of exceptions was to strike the plea from the files and for judgment as in case of default for lack of such an affidavit, or, in the alternative, to strike such plea from the files and order a repleader. The court granted the alternative motion and struck the plea from the files and ordered a repleader by nine A. M. the next day. The replication admitted the sufficiency of the plea, and the plaintiff should first have withdrawn the replication before attacking the plea. If we treat the motion as including a withdrawal of plaintiff's replication, the question then arises whether it was proper to strike the plea in abatement from the files. The general rule is that pleadings should be tested by demurrer and not by motion to strike. Consolidated Coal Co. v. Peers, 166 Ill. 361; Firestone Tire Co. v. Ginsburg, 285 Ill. 132. It is, however, held that under certain circumstances a plea may be stricken from the

and recover for any sum of money which the defendants had and received to the use of the plaintiff to be paid on request, and which, though requested, they had not paid, yet under that declaration as limited by this affidavit plaintiff could only recover from defendants money lost within six months before the commencement of the suit in gambling in the price of grain, and then not to exceed $325.00. This therefore, is an action brought under Section 108 of the Criminal Code, which authorizes the loser to recover from the winner all sums so lost and to bring various forms of actions therefor, including assumpsit for money had and received.

Defendants contend that the plea in abatement was stricken from the files because no affidavit of merits was attached thereto. If that was the ground on which the plea was stricken, that ruling was erroneous, if we were right in holding, in American Spirits Mfg. Co. vs. Peoria Belt Ry. Co., 154 Ill. App. 530, that an affidavit of merits is not required to accompany a plea in abatement, though an affidavit of claim is attached to the declaration. Howe v. Thayer, 4 Ill. 246. Drake v. Drake, 185 Ill 326. But we do not interpret the ruling of the court. The motion as preserved in the bill of exceptions was to strike the plea from the files and for judgment as in case of default for lack of such an affidavit, or, in the alternative, to strike such plea from the files and order a replender. The court granted the alternative motion and struck the plea from the files and ordered a replender by nine A. M. the next day. The replication admitted the sufficiency of the plea, and the plaintiff should first have withdrawn the replication before attacking the plea. If we treat the motion as including a withdrawal of plaintiff's replication, the question then arises whether it was proper to strike the plea in abatement from the files. The general rule is that dilatory pleas should be tested by demurrer and not by motion to strike. Consolidated Coal Co. v. Peers, 166 Ill. 331; Riverstone Tire Co. v. Gleason, 295 Ill. 132. It is, however, held that under certain circumstances a plea may be stricken from the

files, and one of such cases is where the plea presents an immaterial issue. Hitchcock v. Haight, 2 Gilm. 604; McClure v. Williams, 65 Ill. 390; Consolidated Coal Co. v. Peers, supra. The supposed defect in the plea in question which is called a plea to the jurisdiction in the nature of a plea in abatement, is that it not only set up the service of process upon the defendants who joined in that plea in the County of Cook where they reside and not in the County of McDonough, but also that they were not jointly liable with Fluegel for the money sued for. The Chicago defendants contend that under the language of Section 54 of the Practice Act (Cahill's Ill. R. S. p. 2678.) they had a right to d ny joint liability with Fluegel, either by plea in abatement or by plea in bar. In our former opinion we held that this action is not governed by said section 54 of the Practice Act, bedause it is not brought upon a contract, but to recover a statutory penalty for gambling in grain. We now conclude that view is not sound. In 12 R. C. L. 765, it is said: "The right to recover money lost in betting is a demand arising on contract." In Harty Bros. V. Polakon, 237 Ill. 559, the court said: "The law always implies a promise to do that which a party is legally liable to perform." The court there held that the term "implied contract" is also used "to denote that class of obligations imposed or created by law without the assent of the party bound, and sometimes even notwithstanding his actual dissent, upon the ground that they are dictated by reason and justice." It is also there said that these are fictions of law adopted to enforce legal duties; and also, "Whatever the laws order any one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." Chudnovski v. Eckels, 232 Ill. 312, discusses implied contracts, and among them " contracts implied by law from the existence of a plain legal obligation, without regard to the intention of the parties or even contrary thereto." The statute quoted in Warren v. Chambers, 12 Ill. 124, and the former statute of 1841, therein referred to, and section 54 of the present Practice Act, are practically indentical on this subject. In

filed, and one of such cases is where the plea presents an immaterial issue. Hitchcock v. Haight, 2 Gilm. 604; Modtrue v. Williams, 65 Ill. 390; Consolidated Coal Co. v. Foers, supra. The supposed defect in the plea in question which is called a plea to the jurisdiction in the nature of a plea in abatement, is that it not only set up the service of process upon the defendants who joined in that plea in the County of Cook where they reside and not in the County of McDonough, but also that they were not jointly liable with Hugel for the money sued for. The Chicago defendants contend that under the language of Section 24 of the Practice Act (Cahill's Ill. R. S. p. 2578.) they had a right to a by joint liability with Hugel, either by plea in abatement or by plea in bar. In our former opinion we held that this section is not governed by said section 24 of the Practice Act, because it is not brought upon a contract, but to recover a statutory penalty for gambling in grain. We now conclude that view is not sound. In 12 N. C. L. 783, it is said: "The right to recover money lost in betting is a debt arising on contract." In Harty Bros. v. Johnson, 237 Ill. 559, the court said: "The law always implies a promise to do that which a party is legally liable to perform." The court there held that the term "implied contract" is also used "to denote that class of obligations imposed or created by law without the consent of the party bound, and sometimes even contrary to his express dissent, upon the ground that they are dictated by reason and justice." It is also there said that these are fictions of law adopted to enforce legal duties; and also, "Whatever the law order any one to pay, that becomes instantly a debt which he must forthwith contract to discharge." Chadwick v. Moloney, 232 Ill. 312, discusses implied contracts, and among them " contracts implied by law from the existence of a plain legal obligation, without regard to the intention of the parties or even contrary thereto." The statute quoted in Herman v. Chambers, 12 Ill. 114, and the former statute of 1841, therein referred to, and section 24 of the present Practice Act, are practically identical on this subject. In

Warren v. Chambers, supra, it was held that joint liability could only be put in issue by plea in abatement. To the same effect are Shufeldt v. Seymour, 21 Ill. 524, and McKinney v. Peck, 28 Ill. 174. Later cases hold or imply that such denial of joint liability may be either by plea in abatement or by special plea in bar. Smith v. Knight, 71 Ill. 148; Goodenow v. Jones, 75 Ill. 48; Zuel v. Bowen, 78 Ill. 234; Powell Co. v. Finn, 198 Ill. 567. The denial of joint liability was essential to this plea in abatement. We conclude th t the Chicago defendants had a legal right to make that denial in that plea. Plaintiff suggests difficulty in trying the issue under the plea. The same difficulty existed in several of the cases above cited. The motion to strike that plea from the files should have been denied, and if the plea had been questioned by demurrer, that demurrer should have been overruled. Defendants were not bound to plead over.

The judgment must therefore be reversed as to the defendants who filed the plea in abatement. But a judgment at law is a unit as to all defendants. If reversed as to one defendant, it cannot be affirmed as to another. Jansen v. Varnum, 89, Ill. 100; Seymour v. Richardson Fueling Co., 205 Ill. 77/ It is therefore unnecessary to discuss the case as to defendant Fluegel.

The judgment is reversed and the cause is remanded.

Warren v. Chambers, supra, it was held that joint liability could only be set in issue by plea in abatement. To the same effect are Schofield v. Seymour, 21 Ill. 564, and McKinney v. Cook, 28 Ill. 174. Later cases hold or imply that such denial of joint liability may be either by plea in abatement or by special plea in bar. Smith v. Smith, 71 Ill. 148; Goodnow v. Jones, 75 Ill. 48; Wood v. Brown, 75 Ill. 204; Howell v. Flint, 198 Ill. 507. The denial of joint liability was essential to this plea in abatement. We conclude that the Chicago defendants had a legal right to make that denial in that plea. Liability suggests difficulty in trying the issue under the plea. The same difficulty existed in several of the cases above cited. The motion to strike that plea from the files should have been denied, and if the plea had been questioned by demurrer, that demurrer should have been overruled. Defendants were not bound to plead over.

The judgment must therefore be reversed as to the defendants who filed the plea in abatement. But a judgment at law - - - - to all defendants. If reversed as to one defendant, it cannot be affirmed as to another. Jensen v. Young, 89, Ill. 1 0; [illegible] v. [illegible] Mfg Co., 208 Ill. 77\ It is therefore unnecessary to discuss the case as to defendant Finegel.

The judgment is reversed and the cause is remanded.

After the opinion in this case was filed, counsel for appellee filed a petition for a rehearing. In such petition he insists that the case of Shomide v. Brewerton, 306 Ill. 365, is conslusive of the question involved in this case. Upon mature consideration of our original opinion and of the contentions urged by appellee, we are of the opinion that all controversies have been narrowed down to one question, to-wit; whether or not non-residence and non-joint liability can be raised by plea in abatement. We think the cases cited in the original opinion are decisive of the question in favor of the right to raise such questions by plea in abatement as well as by a plea in bar.

In the instant case the questions were properly raised by a plea in abatement. The trial court improperly struck such plea from the files and the appellants having elected to stand by their said plea in abatement after having been ruled to a repleader, were defaulted and were thereby precluded from interposing a defense. We think this was error and we cannot perceive how it can be seriously contended that the Shomide case is authority for a different conclusion. The only thing settled in the Shomide case was the procedure which should obtain at the close of the evidence where the resident defendants are dismissed out of court leaving only the non-resident defendants in court. The Supreme Court in that case said that inasmuch as a plea of the general issue was on file it would have perhaps been better practice for the non-resident defendants to have asked leave to withdraw the plea of the general issue andthen to file a plea in abatement. Naturally this suggestion by the Supreme Court would be wholly unnecessary if such non-resident defendants had already filed a plea in abatement and had not filed a plea of the general issue.

After the opinion in this case was filed, counsel for appellee filed a petition for a rehearing. In such petition he insists that the case of Shomlie v. Brewster, 305 Ill. 355, is conclusive of the question involved in this case. Upon mature consideration of our original opinion and of the contentions urged by appellee, we are of the opinion that all controversies have been narrowed down to one question, to-wit; whether or not non-residence and non-joint liability can be raised by plea in abatement. We think the cases cited in the original opinion are decisive of the question in favor of the right to raise such questions by plea in abatement as well as by a plea in bar.

In the instant case the questions were properly raised by a plea in abatement. The trial court improperly struck such plea from the files and the appellants having elected to stand by their said plea in abatement after having been ruled to a replication, were defaulted and were thereby precluded from interposing a defense. We think this was error and we cannot perceive how it can be seriously contended that the Shomlie case is authority for a different conclusion. The only thing settled in the Shomlie case was the procedure which should obtain at the close of the evidence where the resident defendants are dismissed out of court leaving only the non-resident defendants in court. The Supreme Court in that case said that inasmuch as a plea of the general issue was on file it would have perhaps been better practice for the non-resident defendants to have asked leave to withdraw the plea of the general issue and then to file a plea in abatement. Without this suggestion by the Supreme Court would be wholly unnecessary, if such non-resident defendants had already filed a plea in abatement and had not filed a plea of the general issue.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 30th day of April in the year of our Lord one thousand nine hundred and twenty-three

Justus L. Johnson
Clerk of the Appellate Court.

7058 (2417)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 172

BE IT REMEMBERED, that afterwards, to-wit: on [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

The People of the State of Illinois,

Defendant in error,

vs. Error to Carroll

Clare Holman, Plaintiff in error.

Per curium. Section 27 of the Prohibition Act (Cahill's R. S., p. 1464) is as follows: "It shall be unlawful for any person to own, operate or maintian, or have in his possession or any interest in a still, unless he shall first secure a permit from the Attorney General, but in case the office of Commissioner of Prohibition shall be created, then from such Commissioner, to own such still, which permit shall be kept conspicuously posted at the place where the still is located." Clare Holman and Albert Holman were indicted by the grand jury of Carroll County under said section, The indictment contained six counts. Some charges that defendants had in their possession a still, etc., some that they unlawfully owned, operated and maintained and had in their possession and had an interest in a still; some that they unlawfully operated a still and had an unlawful interest in a still, etc. Each count charged that this was without a legal permit from the Attorney General. Albert Holman pleaded guilty. Clare Holman moved to quash the indictment. That motion was denied. He then pleaded not guilty, was tried by a jury and convicted. A motion for a new trial was denied and he was sentenced to pay a fine of $150.00 and the costs and to imprisonment in the county jail for five months. He has sued out this writ of error to review that judgment.

It is claimed that the indictment should have been quashed because the statute does not warrant the indictment. Defendant contends that it is not a violation of the above section to operate or maintain or have in possession a still without a permit by the Attorney General, and that it is only in case the defendant owns the still that he is required to have such permit. We hold it to be the true construction of said section that it is unlawful for any person to own, operate, maintain or have in his possession or have any interest in a still, unless he first procures

The People of the State of Illinois,

Defendant in error,

vs. Error to Carroll

Clare Holman, Plaintiff in error.

For opinion. Section 27 of the Prohibition Act (Cahill's R. S., p. 1464) is as follows: "It shall be unlawful for any person to own, operate or maintain, or have in his possession or any interest in a still, unless he shall first secure a permit from the Attorney General, but in case the office of Commissioner of Prohibition shall be created, then from such Commissioner, to own such still, which permit shall be kept conspicuously posted at the place where the still is located." Clare Holman and Albert Holman were indicted by the grand jury of Carroll County under said section. The indictment contained six counts. Some charges that defendants had in their possession a still, etc., some that they unlawfully owned, operated and maintained and had in their possession and had an interest in a still; some that they unlawfully operated a still and had an unlawful interest in a still, etc. Each count charged that this was without a legal permit from the Attorney General. Albert Holman pleaded guilty. Clare Holman moved to quash the indictment. That motion was denied. He then pleaded not guilty, was tried by a jury and convicted. A motion for a new trial was denied and he was sentenced to pay a fine of $150.00 and the costs and to imprisonment in the county jail for five months. He has sued out this writ of error to review that judgment.

It is claimed that the indictment should have been quashed because the statute does not warrant the indictment. Defendant contends that it is not a violation of the above section to operate or maintain or have in possession a still without a permit by the Attorney General, and that it is only in case the defendant owns the still that he is required to have such permit. We hold it to be the true construction of said section that it is unlawful for any person to own, operate, maintain or have in his possession or have any interest in a still, unless he first secures

the required permit. It would defeat the obvious purpose of the statute to construe it to mean that a still may be maintained without a permit from the Attorney General.

It is argued that a new trial should have been granted because no proof was introduced that defendant did not have a license from the Attorney General as required by the Act. In support of this position defendant relies upon People v. Butler, 268 Ill. 635, and other like cases. We are of the opinion that these cases are not properly applicable to the question here presented. In kettles v. People, 221 Ill. 221, on p. 229 the court said:

> "Whether the plaintiff in error was licensed to practice dentistry in the state of Illinois was a matter of defense which devolved on him to establish. Where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be taken as true. Such is the rule in all prosecutions for the doing of an act which the statute prohibits to be done by any person except those who are duly licensed."

The same doctrine was applied in Birr b. People, 113 Ill. 645, in a case of a prosecution under the Dram Shop Act for selling liquors to a minor without the written order of his parent, guardian or physician, as required by the statute. It was there held that the People were not required to prove lack of such a written order, but that it was for the defendant to prove the existence of a written order, if it existed. This rule was again applied in People v. Montgomery, 271 Ill. 580, where the charge was the sale of a certain drug without the written prescription of a registered physician. No proof of the non-existence of such a written prescription was made. It was held the burden of proof on that subject was on the defendant. The position of the prosecution on this subject is further sustained by Section 39 of said Prohibition Act (Cahill's R. S., p. 1467), where it is provided that it shall not be necessary in any indictment to include any defensive negative averments. We therefore hold that the point made is not well taken, and that the duty rested on defendant to prove such a permit, if he had it.

It is contended the evidence did not warrant the conviction. On

the required permit. It would defeat the obvious purpose of the statute to construe it to mean that a still may be maintained without a permit from the Attorney General.

It is argued that a new trial should have been granted because no proof was introduced that defendant did not have a license from the Attorney General as required by the act. In support of this position defendant relies upon People v. Butler, 268 Ill. 635, and other like cases. We are of the opinion that these cases are not properly applicable to the question here presented. In Kettles v. People, 221 Ill. 221, on p. 229 the court said:

> "Whether the plaintiff in error was licensed to practice dentistry in the state of Illinois was a matter of defense which devolved on him to establish. Where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be taken as true. Such is the rule in all prosecutions for the doing of an act which the statute prohibits to be done by any person except those who are duly licensed."

The same doctrine was applied in Tier v. People, 115 Ill. 633, in a case of a prosecution under the Dram Shop Act for selling liquors to a minor without the written order of his parent, guardian or physician, as required by the statute. It was there held that the people were not required to prove lack of such a written order, but that it was for the defendant to prove the existence of a written order, if it existed. This rule was again applied in People v. Montgomery, 271 Ill. 560, where the charge was the sale of a certain drug without the written prescription of a registered physician. No proof of the non-existence of such a written prescription was made. It was held the burden of proof on that subject was on the defendant. The position of the prosecution on this subject is further sustained by Section 39 of said Prohibition Act (Smith's A. S., p. 1457), where it is provided that it shall not be necessary in any indictment to include any defensive negative averments. We therefore hold that the point made is not well taken, and that the duty rested on defendant to prove such a permit, if he had it.

It is contended the evidence did not warrant the conviction. On

August 5, 1921, the Sheriff and a deputy, accompanied by the State's Attorney of Carroll County, went to a heavily wooded island in Carroll County about 4 P. M. and there found a still, but without a fire, the details of which still do not need to be described as the evidence on that subject is not denied. They went away and returned about 8 P. M. and found a still in operation with a fire, and found there present Clare and Albert Holman. Clare was a bachelor, who lived about 60 rods from the still and was a grown man. Albert was his nephew, about 19 years old. When the officers found them, the proof by the Sheriff and his deputy was that Clare said: "Don't it beat hell; the first batch I tried to make I get caught before I even get a drink." One of the officers on repeating the remark varied it slightly. The remark implied that he was trying to make intoxicating liquor at that still. Neither defendant said anything further at that time as to who owned or was operating the still. They were arrested and taken to the county jail, and were brought back to the vicinity of the still the next morning for an examination before a justice of the peace. At that time each defendant claimed, as he also testified on the trial in the circuit court, that Albert had assembled the entire outfit constituting the still, mostly from equipment which he found in the woods in that vicinity, where someone apparently had had a still before that, and that Clare had no interest in the still and had taken no part in its operation and had never been there until three or five minutes before the officers came, when he came bringing a lantern at the request of his nephew. Clare did not deny the statement charged to have been made by him that evening, but only testified that he did not remember it. When all the details of this evidence are considered we conclude that a verdict against Clare cannot be disturbed on the ground that it is not supported by the evidence. In view of the fact, however, that the People had no positive evidence that Clare had any possession of or interest in the still, while defendant and his nephew gave positive evidence that he had none, it was important that the jury should be correctly instructed in regard to the rules applicable to the testimony of

August 5, 1921, the sheriff and a deputy, accompanied by the state's Attorney of Carroll County, went to a hickory wooded island in Carroll County about 4 P. M. and there found a still, and without a fire, the details of which still is not used to be described as the evidence in that subject is not wanted. They went away and returned about 8 P. M. and found a still in operation with a fire, and found there present Clare and Albert Holman. Clare was a bachelor, who lived about 60 rods from the still and was a grown man. Albert was his nephew, about 19 years old. When the officers found them, the sheriff and his deputy was that Clare said: "Don't it beat hell; the first batch I tried to make I get caught before I ever get a drink." One of the officers corrected the remark varied it slightly. The remark implied that he was trying to make intoxicating liquor at that still. Neither defendant said anything further at that time as to who owned or was operating the still. They were arrested and taken to the county jail, and were brought back to the vicinity of the still the next morning for an examination before a justice of the peace. At that time each defendant claimed, as he also testified on the trial in the circuit court, that Albert had accompanied the entire outfit come running the still, nearly from equipment which he found in the woods in that vicinity, where someone evidently had had a still before that, and that Clare had come upon the still and had taken no part in its construction or had never from the still three or five minutes before the officers came. He denied having a lantern at the request of his nephew. Clare did not deny the statement charged to have been made by him that anyone, but only testified that he did not remember it. When all the detail of his evidence was considered we conclude that a verdict against Clare cannot be sustained on the ground that it is not supported by the evidence. In view of the case, however, that the People had no positive evidence that Clare had any possession of or interest in the still, while defendant had his nephew, who testified evidence that he had done, it was important that the jury should be correctly instructed in regard to the rules applicable to the testimony of

the defendant.

The court at the request of the People gave the following instruction:

> "The Court instucts the jury, that while the law makes the defendant a competent witness in this case, yet the jury have a right to take into consideration his situation and interest in the result of your verdict, and all the circumstances in evidence, and to give his testimony when considered together with all the evidence in the case such weight as, in your judgment, it is fairly entitled to."

No other instruction on that subject was given by the court. The sufficiency of such an instruction has been frequently discussed by our Supreme Court. Such an instruction was approved in Doyle v. People, 147 Ill. 394, and that ruling was followed without discussion in People v. Terrell, 262 Ill. 138, on p. 146. But on the same day in an opinion by the same judge in People v. Harrison, 261 Ill. 517, on pp. 524-526, it was held that such an instruction coupled with the requirement stated in the instruction that the same tests apply to all other witnesses as to the defendant is approved in many cases. It was found there that in that case the instruction complained of was followed by another instruction given, which did inform the jury that the testimony of the defendant was to be subjected to the same tests as other witnesses, except in the mere fact that he was the defendant being tried. But it was there said:

> "An instruction which singles out the defendant, alone, from all the other witnesses and calls the jury's attention to his interest, or to some other circumstance which may affect his credibility, ought not to be given without also telling the jury that the same test applies to all the witnesses in the case as well as to the defendant."

This matter was again under review in the recent case of People v. Harvey, 286 Ill. 593. The 12th instruction in that case was much like the instruction now under consideration, and in the 13th instruction there given was the following: "And in determining the wright and credit to be given his testimony you have a right to consider not only the fact that he is the defendant on trial and his interest in the result of the suit, but also his demeanor on the witness stand, " etc. Of this instruction the court there said: "This instruction, as well as the words quoted from instruction 13, would tend to discredit the testimony of plaintiff in error and put him in

the information.

The court at the request of [illegible] instructions:

> "The Court instructs [illegible] the defendant [illegible] at the same, [illegible] the jury have a right to take into [illegible] in the [illegible] and all the circumstances [illegible] evidence, and if [illegible] from all the evidence [illegible] with all the [illegible] such weight as, in your judgment, it is fairly [illegible]."

No other instruction [illegible] given by the court. The sufficiency of such an instruction has been [illegible] in our courts. Such an instruction was approved in [illegible] 147 Ill. 334, and that ruling was followed without discussion in [illegible] Terrell, 202 Ill. 182, [illegible] 164. But on the same day in [illegible] the same judge in [illegible] v. Harrison, 147 Ill. 317, in [illegible] held that such [illegible] instruction with the [illegible] instruction that the [illegible] defendant is [illegible] the [illegible] which [illegible] subjected to [illegible] that is [illegible]:

> "[illegible]"

[illegible] 286 Ill. [illegible] Fairchild: [illegible] have [illegible] and on [illegible] manner on the witness [illegible] said: "This instruction, [illegible] would tend to discredit the [illegible]

an inferior class from the other witnesses testifying in the case, and would tend to lead the jury to believe that they were not bound to treat his testimony as the testimony of the other witnesses." The court also there said: "There was nothing in the twelfth, or thirteenth instruction which would lead the jury to understand that they were to apply the same tests to the testimony of the defendant as to other witnesses." This is the last expression of the Supreme Court on the subject. The frame of the instruction throws a doubt upon the testimony of the defendant, and it does not tell the jury that his testimony is to be subject to the same tests as other witnesses except as to the fact that he is a defendant and was interested in the result. In a case so close as this upon the facts and with such strong evidence in the record in favor of the defendant, we conclude that the judgment should be reversed and a new trial awarded because of the giving of this instruction with no qualification in that of any other instruction.

The judgment is therefore reversed and the cause remanded.

[illegible] inferior about from the other [illegible] [illegible]
would tend to lead the jury [illegible] [illegible]
the testimony, or the [illegible] of the [illegible] witnesses. [illegible]
there said: "There was [illegible] in the [illegible]
which would lead the jury to conclude that they [illegible] the case
beats to the judgment of the defendant [illegible]
the just consideration of the [illegible]
the instruction throws a doubt [illegible] the testimony of the defendant, and it
does not tell the jury that it is [illegible] to the [illegible]
as other witnesses [illegible] to the fact of the [illegible]
terested in the result. In a case so close as this [illegible]
such strong evidence in the record in favor of the [illegible]
that the judgment should be reversed [illegible]
the giving of this instruction with [illegible] in that [illegible]
instruction.

The judgment is therefore reversed and the [illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 14th day of Nov. in the year of our Lord one thousand nine hundred and twenty-two.

Justus L. Johnson
Clerk of the Appellate Court.

7067

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and twenty-two, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTEOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
CURT S. AYERS, Sheriff.

227 I.A. 617

BE IT REMEMBERED, that afterwards, to-wit: on OCT 25 1922 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

AT A TERM OF THE APPELLATE COURT,

begun and held at Ottawa, on Tuesday, the third day of December,

in the year of our Lord one thousand nine hundred and

twenty-two, within and for the second District of the State

of Illinois:

Present--The Hon. NORMAN L. JONES, presiding Justice.

Hon. AUGUSTUS L. CARNES, Justice.

Hon. THOMAS M. JACK, Justice.

JOSEPH E. DONNELLY, Clerk.

CHAS. F. AYRES, Sheriff.

BE IT REMEMBERED, that on the [illegible]

Clerk's office of said Court, [illegible]

following, to wit:

Albert Fowler, et al., appellees,

vs. Appeal from Boone

William C. DeWolf, appellant.

Per Curiam.

William C. DeWolf owned a farm in Boone County. Paul Naatz was his tenant thereon. Naatz was heavily indebted to a bank and indebted in smaller sums to many other people The lease was ended in September, 1919, before it expired by its terms. The tenant owned certain horses, farm implements and machinery on the farm, and DeWolf and Naatz owned in equal parts other live stock and farm products on the farm. They desired to sell all of this and they agreed to have a joint sale, both of the jointly owned property and of that owned by Naatz. They agreed on an auctioneer and a clerk. John F. Meyers, Vice President of the bank in question and surety for Naatz on commercial paper was selected as clerk. The sale was advertised and held on September 19, 1919. At the sale the auctioneer announced in the presence of DeWolf and Naatz, that the purchasers should settle with the clerk. At that sale Albert Fowler and Bert Fowler each purchased quantities of hay. After the sale contentions arose between DeWolf and Meyers. DeWolf notified Meyers not to collect from the Fowlers and notified the Fowlers not to pay Meyers. Afterwards the Fowlers each paid Meyers the amount of his bid and Meyers received it. Thereafter DeWolf sued Meyers in assumpsit in the circuit court for what he claimed he ought to receive from the proceeds of the sale. Meyers then filed a bill and an amended bill of interpleader against DeWolf and Naatz, in which he alleged the fact of his clerking at that sale, and receiving as such clerk, various sums of money and notes for property purchased there, and his inability to settle with the owners of the property, and his willingness to pay each whatever share of the proceeds belonged to him and he asked that they interplead and that the amount

Albert Towler, et al., appellees,

vs. Appeal from Boone

William C. DeWolf, appellant.

Per Curiam.

William C. DeWolf owned a farm in Boone County. Paul Marts was his tenant thereon. Marts was heavily indebted to a bank and indebted in smaller sums to many other people. The lease was ended in September, 1919, before it expired by its terms. The tenant owned certain horses, farm implements and machinery on the farm, and DeWolf and Marts owned in equal parts other live stock and farm products on the farm. They desired to sell all of this and they agreed to have a joint sale, both of the jointly owned property and of that owned by Marts. They agreed on an auctioneer and a clerk. John F. Meyers, Vice President of the bank in question and authority for Marts on commercial paper was selected as clerk. The sale was advertised and held on September 19, 1919. At the sale the auctioneer announced in the presence of DeWolf and Marts, that the proceeds should settle with the clerk. At that sale Albert Towler and Bert Towler each purchased quantities of hay. After the sale contentions arose between DeWolf and Meyers. DeWolf notified Meyers not to collect from the Towlers and notified the Towlers not to pay Meyers. Nevertheless the Towlers each paid Meyers the amount of the bill and Meyers received it. Thereafter DeWolf and Meyers in assumpsit in the circuit court for what he claimed he ought to receive from the proceeds of the sale. Meyers then filed a cross-petition and an amended bill of interpleader against DeWolf and Marts, in which he alleged the fact of his clerking at that sale, and receiving as such clerk, various sums of money and notes for property purchased there, and his inability to settle with the owners of the property, and his willingness to pay such whatever sums of the proceeds belonged to him and he asked that they interplead and that the amount

he owed each be ascertained. He alleged that he was indifferent as between the parties. Thereafter DeWolf brought suits against Albert Fowler and Bert Fowler, severally, before a justice of the peace and there had a judgment against each. DeWolf appealed therefrom to the county court, and the Fowlers each appealed to the circuit court, so that there were four suits pending in favor of DeWolf against the Fowlers in the two courts. Thereafter, by leave of court, in the Meyers interpleader suit, each of the Fowlers filed an intervening petition, setting up his purchase of hay at the sale and the amount bid therefor and that he had paid the same to Meyers, the clerk of the sale, and that DeWolf had thereafter sued him and the result of the suit and the pendency of the appeals in the County and Circuit court. They each asked and obtained an injunction, restraining DeWolf from prosecuting those appeal cases in the county and circuit courts. DeWolf answered the Meyers bill, and the cause was referred to a master to take and report the evidence and his conclusions. Thereafter the Fowlers conceived that their intervening petitions were defective in some respect, and by leave of court each filed an amended intervening petition with like prayer for injunction. The master took much evidence, in which the Fowlers did not take part, although they seem to have had a solicitor present who was prevented by objection from cross-examining one or more witnesses. The matter of the purchase of the hay and of the payment therefor was gone into before the master by Meyers and DeWolf, respectively. After the proof was nearly concluded Naatz was allowed to file an answer and introduce some testimony. The master made a long report in which he found among other things that Meyers was not indifferent as between the parties, and that his bill of interpleader should be dismissed. He found the facts as to the Fowlers. Meyers filed objections to the report which were overruled, and then filed them as exceptions before the court, and ~~they were~~

be owed such be ascertained. He alleged that he was indifferent as between the parties. Thereafter DeWolf brought suits against Albert Fowler and Bert Fowler, severally, before a justice of the peace and there had a judgment against each. DeWolf then appealed therefrom to the county court, and the Fowlers also appealed to the circuit court, so that there were four suits pending in favor of DeWolf against the Fowlers in the two courts. Therefore, by leave of court, in the Meyers inter pleader suit, each of the Fowlers filed an interpleading petition, setting up his interest in the money at the sale and the amount due thereof and that he had paid the same to Meyers, the officer of the sale, and that DeWolf had thereafter used him and the result of the suit and the pendency of the appeals in the County and Circuit court. They asked and obtained an injunction, restraining DeWolf from prosecuting those appeals pending in the county and circuit courts. DeWolf answered the Meyers suit, and the [illegible] to take report the evidence and file conclusions. Thereafter the Fowlers also received that their interpleading petitions [illegible] in some respect, and by leave of court [illegible] in-venting petition with like prayer [illegible]. The [illegible] much evidence, in which the Fowlers [illegible] they seem to have had a solicitor [illegible] objection from cross-examining [illegible]. The [illegible] of the introduction of the day and of [illegible] into before the master by Meyers and DeWolf.

[illegible] the court was merely [illegible] answer and intervene [illegible]. [illegible] report in which he found [illegible] not indifferent as between the parties, [illegible] pleader should be dismissed. He [illegible] Fowlers. Meyers filed [illegible] ruled, and then filed [illegible]

they were

there overruled. On July 30, 1931, a decree was entered. The court overruled the exceptions of Meyers and confirmed the master's report and dismissed his bill of interpleader for want of equity as to Meyers only. The court consolidated said amended bill with the petitions of Albert and Bert Fowler in order to determine their rights and equities. The court then offered to re-refer said cause to the master to take further testimony, and the parties were present in court and did not desire to have said cause re-referred and to present any further testimony. We interpret this to mean that the parties submitted the interests of the Fowlers for determination upon the master's report of proofs and findings then in the record. The court then passed upon the equities of said Fowlers and found that before they paid Meyers for what they purchased at the sale they were notified by DeWolf not to pay Meyers for the same, and that Meyers before receiving said pay from them was notified by DeWolf not to receive any pay from Albert and Bert Fowler; that notwithstanding said notice they did pay ~~Albert and Bert Fowler~~ Meyers the full price at which they respectively purchased the hay at said sale; and that they had a legal right to pay said Meyers therefor; and the court overruled the master's report finding otherwise in that respect. The court further found that said hay was the joint property of DeWolf and Naatz, and that prior to said sale and at said sale DeWolf and Naatz had fully authorized Meyers to collect the purchase price of said crops from all purchasers and from said Albert and Bert Fowler. The court made perpetual the injunction theretofore ordered against DeWolf and Naatz, and perpetually enjoined DeWolf from further prosecuting the suits pending the county court and in the circuit court against Albert and Bert Fowler. DeWolf prosecutes this appeal from that decree and only claims error as to the Fowlers.

There is no assignment of errors on this record. Rule 12 of

there overruled. On July 30, 1891, a decree was entered. The court overruled the exceptions of Meyers and confirmed the master's report and dismissed his bill of interpleader for want of equity as to Meyers only. The court consolidated said remaining bill with the petitions of Albert and Bert Fowler in order to determine their rights and equities. The court then offered to re-refer said cause to the master to take further testimony, and the parties were present in court and did not desire to have said cause re-referred and to present any further testimony. We infer from this to mean that the parties submitted the interests of the Fowlers for determination upon the master's report of proofs and findings then in the record. The court then passed upon the equities of said Fowlers and found that before they sold Meyers for what they purchased at the sale they were notified by DeWolf not to pay Meyers for the same, and that Meyers before receiving said money from them was notified by DeWolf not to receive any from Albert and Bert Fowler; that notwithstanding said notice they did pay ~~xxxxxxxxxxxxxxxxxx~~ Meyers the full price at which they respectively purchased the hay at said sale; and that they had a legal right to pay said Meyers therefor; and the court overruled the master's report finding otherwise in their favor. The court further found that said hay was the joint property of DeWolf and Marsh, and that prior to said sale and at the time of said sale Marsh had fully authorized Meyers to collect the proceeds of said crops from all purchasers and from said Albert and Bert Fowler. The court made perpetual the injunction therefore granted against DeWolf and Marsh, and not finally enjoined DeWolf from further prosecuting the suits pending the court and in the circuit court against Albert and Bert Fowler. DeWolf prosecutes this appeal from that decree, and only asks reversal as to the Fowlers.

There is no assignment of error in the record. Nor is it

this court (137 Ill. app. 624) provides that the assignment of errors must be written upon or attached to the record. The Supreme Court has had a similar rule for many years. The rule now in force in that court is Rule 11. 273 Ill. 14, 15. The force and effect of this rule has been often discussed by the Supreme Court and by the appellate courts, from Williston v. Fisher, 28 Ill. 43, down to People v. Andrus, 299 Ill. 50. In the latter case it is said on p. 56: "It is a rule of this court with all the force of a statute, that when a transcript of the record is filed the appellant shall in every case assign errors, which must be written upon or attached to the record, and on failing to comply with the rule the appeal may be dismissed or the judgment or decree affirmed." A supposed assignment or errors is printed in the abstract. In several of the cases it is held that that does not comply with the rule. Benneson v. Sagage, 119 Ill. 135; People v. Pryer, 157 Ill. App. 89. We so held in Guth v. Haas, 210 Ill. App. 437. While some of the cases on this subject hold that the proper order in such case is to dismiss the appeal, others hold that in such case the judgment or decree may be affirmed. This condition of the record requires us either to dismiss the appeal or to affirm the decree. We conclude, however, to discuss some other questions appearing in the record.

DeWolf here seems to contend that no intervening petitions were filed by the Fowlers. On the contrary, we find in the record what we conceive to be a petition and an amended petition by each of them sufficient for the purposes of this decree.

DeWolf contends that when Meyers' bill of interpleader was dismissed there was nothing left to support further action by the court. All that was done in the final decree was on one day. If the decree had been so worded as to first grant the prayers of the intervening petitions and then dismiss the bill as to Meyers only, we presume it would not be supposed that there was nothing to support the decree in favor of the Fowlers. We hold that it is

this court (137 III. 400, 404) [illegible] that the [illegible] be written upon or attached to the record. The [illegible] similar rule for [illegible] cases. The rule [illegible] rule 12. 273 III. 14, 15. The [illegible] offer [illegible] offer discussed by the Supreme Court and by the [illegible] Williston v. Fisher, 38 III. 43, [illegible] to [illegible] In the latter case it is said on p. 50: "[illegible] all the force of a statute, that [illegible] is filed the appellant shall in every case assign error, which must be written upon or attached to the record, and [illegible] the rule the appeal may be dismissed or the judgment [illegible] A supposed assignment of error is printed in the [illegible] of the cause it is held that that does not comply with the rule. [illegible] v. Sagage, 119 III. 185; [illegible] v. [illegible], 137 III. [illegible] in Duth v. [illegible], 210 III. 400. [illegible] subject hold that the [illegible] others hold that [illegible] this condition of the record requires an [illegible] to affirm the [illegible] questions appearing in the record.

Dewolf here seems to contend that [illegible] filed by the [illegible] conceive to be a petition and a [illegible] sufficient for the purposes of this [illegible].

Dewolf contends that when [illegible] there was nothing left to amount to [illegible] was done in the final decree [illegible]. If the [illegible] w rdad as to first point the [illegible] then dismiss the bill as to [illegible] supposed that there was [illegible] the [illegible] forwhere. We hold that [illegible]

immaterial in what order the several proceedings of that one day were stated in the decree, but that it is all one decree on that day. But if this is not so, the Fowlers were parties to the suit. They had equities to be adjusted which were also set up in the answer of DeWolf to Meyers' bill. They had petitions filed by leave of court, asking the court to protect them, and it was proper to adjust their equities. In a cause in equity, the equities of all the parties should be disposed of, if practicable, and they should not be left for further litigation. Among the many cases so holding are the following: Chandler v. Morey, 195 Ill. 596; Longshore v. Longshore, 200 Ill. 470; Braithwaite v. Henneberry, 222 Ill. 50. We applied this rule in Roman v. Humphreys, 220 Ill. App. 502. We therefore conclude that the court had jurisdiction on that day to settle the equities of all the parties by its decree, except those of Meyers, for reasons stated by the master and not questioned here.

DeWolf contends that as the Fowlers filed no objection to the master's report before that officer, nor any exceptions to his rulings before the court, they are bound by the findings of the master and therefore could not have this decree. The rule is that the findings of fact by the master are binding on the parties who do not properly object and except to them, but that such parties may question his determination of questions of law arising from the facts so found without any objection or exception. Von Platen v. Winterbotham, 203 Ill. 198; Marlow v. Rich, 252 Ill. 442; Olp v. Meyers, 277 Ill. 202. The master found all the facts as claimed by the Fowlers, but he held as a matter of law that DeWolf had power to forbid Meyers, the clerk at the sale, to settle with the parties after the sale was over, and notwithstanding the announcement at the sale by the auctioneer in the presence of DeWolf and Naatz that every purchaser should settle with the clerk. It was not necessary that the Fowlers should except to the rulings of the master on the facts in order to determine that

immaterial in what order the several [illegible] stated in the decree, and that it is [illegible]. If this is not so, [illegible] equities to the adjuster which [illegible] to Meyers' bill. They had petitions filed [illegible] the court to protect them, and it was [illegible]. In a cause in equity, the equities of all the parties [illegible] of, if practicable, and they should not be [illegible]. Among the many cases [illegible] the following: [illegible] 156 Ill. 576; [illegible] v. Longenecker, [illegible] Ill. 430; [illegible] Henebery, [illegible] Ill. [illegible] v. [illegible], 220 Ill. App. 582. We therefore conclude that the court had jurisdiction on that day to settle the equities of all the parties [illegible], except those of Meyers, [illegible] questioned here.

DeWolf contends that as the [illegible] master's report before that officer, [illegible] before the court, they are bound by the findings [illegible] fore could not have this decree. The rule is that the findings of fact by the master are binding on the parties [illegible] except to them, but that such parties may [illegible] questions of law [illegible] or exceptions. [illegible] Ill. [illegible] 258 Ill. 462; [illegible] v. Meyers, [illegible] Ill. [illegible] facts as disclosed by [illegible] Wolf had [illegible] the [illegible] after [illegible] at the sale by the [illegible] purchaser should settle with the [illegible]. It was not [illegible] Paulsen should except to the report of the master [illegible] to determine that

question of law, and the court held that the master had determined that question erroneously. The virtual agreement that Meyers should receive the proceeds of the sale from the buyers was made by DeWolf and Naatz, jointly. Meyers became their joint agent. DeWolf alone could not afterwards cancel that authority. The Fowlers therefore had a right to pay to Meyers. They could not safely pay any one else. DeWolf and Naatz owned this hay jointly, each an undivided one-half. On a settlement between DeWolf and Naatz, it might turn out that Naatz was entitled to receive this money, for DeWolf received considerable sums from Meyers.

There is another reason why it was proper to enjoin DeWolf from prosecuting these suits in his own name against the Fowlers. He did not own this money. He only had a one-half interest in it. Any suit at law to collect the money from the Fowlers, if they had not paid it, must have been brought in the joint names of DeWolf and Naatz. As DeWolf could not recover in his own name alone, a court of equity would properly forbid that the Fowlers be harassed by these suits. DeWolf claims that the Fowlers, or one of them, promised to see him paid. The master made no such findings of fact and DeWolf did not object or except to his report. He therefore cannot take advantage of any such supposed proof before the master.

We must presume that the master was right in finding that Meyers was partial and not indifferent and that his bill of interpleader was properly dismissed as to him for that reason. It is to be regretted that either DeWolf or Naatz did not file a cross bill for an accounting. It seems to be evident that DeWolf alone cannot recover any of the proceeds of this sale in an action at law against Meyers, in which Naatz does not join, and that the true state of the accounts arising out of this sale cannot be determined by a jury in an action at law brought by only one of the two interested parties. It seems to us there must be an

question of law, and the court held that the master had framed the question correctly. The virtual agreement that the papers should receive the proceeds of the sale from the papers was made by DeWolf and Martin, jointly. May is because their joint account. Martin alone could not afterwards cancel that authority. The Powers therefore had a right to pay to May re. They could not authority any one else. DeWolf had the crucial fire day liability, such an unlimited credit. On a settlement between DeWolf and Martin, it might turn out that Martin was entitled to receive this money, for DeWolf received considerable sums from Meyers.

There is much reason why it was proper for DeWolf from prosecuting these suits in his own name against the Powers. He did not own this money. He only had a one-third interest in it. Any suit at law to collect the money from the Powers, if they had not paid it, must have been brought in the joint name of DeWolf and Martin. As DeWolf could not recover from the alone, a court of equity would properly forbid that the Powers be harassed by these suits. DeWolf claims that the Powers, or one of them, refused to see the rent. The part of the Powers Findings of fact and DeWolf did not object or except to the report. He therefore cannot take advantage of any such contention proof before the master.

We must presume that the master was right in finding that Meyers was partial and not indifferent and that in fact of interpleader was properly dismissed as to the [illegible]. It is to be regretted that either DeWolf or Martin did not [illegible] trade bill for an accounting. It seems to be evident that D alone cannot recover any of the rent [illegible] at law against Meyers, in which [illegible] the true state of the account [illegible] be determined by a jury in an action [illegible] of the interested parties. It seems to be [illegible]

accounting and a settlement of the state of the accounts in some binding form before Meyers can safely pay either party.

The decree is affirmed.

accounting and a settlement of the state of the accounts in some binding form before Meyers can satisfy any either party.

The decree is affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 12th day of December in the year of our Lord one thousand nine hundred and twenty-two

Justus L. Johnson

Clerk of the Appellate Court.

Opinion filed July 10-1922

General No. 7280 Agenda No. 5

October Term A. D. 1921

Ralph Bradford, a Minor by Claude Bradford, his next friend, Appellee,

vs.

J. G. Fisher, Appellant

Appeal from Vermilion.

227 I.A. 217

NIEHAUS, J.

Ralph Bradford, a fourteen year old boy, on or about October 24th, 1919, was returning home, after attending school; and with other boys, was going along a paved country road in Vermilion county, called Oakwood Avenue, near the city of Danville. When he arrived at a point about 200 feet east of O'Neal's store, on the road in question, he attempted to cross; and in attempting to cross the road, came into contact with appellant's automobile, which appellant was driving at an alleged excessively high rate of speed. The automobile ran over appellee's left leg; and he suffered an oblique fracture of the femur; and other minor injuries. The fracture resulted in at least one permanent injury, namely, shortening of the injured leg. Suit was commenced in the circuit court of Vermilion county by appellee, by next friend, against the appellant J. G. Fisher; and a trail was had, which resulted in a verdict in favor of the appellee, fixing the amount of his damages at $3,000.00. The appellant made a motion for a new trial, which after a remittitur of $105.00 had been entered by the appellee, was overruled by the court; and a judgment was thereupon entered for $2895.00. From this judgment an appeal is prosecuted. The judgment was affirmed by this court in an opinion filed at the previous term, but a re-hearing was granted to enable the court to re-examine some of the questions, which were raised on appeal. Appellant's first contention relates to the amended declaration consisting of four counts, which was filed in the case. It is contended that

this declaration is substantially defective; and that the court should have sustained the demurrer thereto. The first count was legally sufficient under the holding of the Supreme Court in the case of Chicago City Railway Co. v. Jennings 154 Ill. 274; and we are of opinion, that the other counts also state a cause of action; but

any defects or omissions in the statement of a cause of action in any of the counts, though fatal on demurrer, cannot be a matter of contest after issue joined, and a trial had upon the issues raised, and a verdict rendered on the issues. Jerke vs. Francher 158 Ill. 375; Watkins Medical Co. v. Bailey 217 Ill. App. 460; Fairbanks v. Babre 213 Ill. 636. Appellant contends, that there is a variance between the proofs, and the allegations in the declaration. It is sufficient to say, with reference to this contention, that no such question was raised on the trial in the court below. In order to raise the question of variance, a specific objection must be made at the trial of the case, and variance pointed out at that time; Linquist v. Hodges 248 Ill. 491; Swift & Co. v. Rulkowski 182 Ill. 18; Swift & Co. v. Madden 165 Ill. 41; Ballah v. Peoria Life Ins. Co. 168 Ill. App. 603. Appellant contends, that the evidence clearly shows, that the appellee was guilty of contributory negligence. Whether the appellee, in attempting to cross the highway in question, under the circumstances, and in the manner in which he did it, was guilty of contributory negligence, was a question for the jury to determine; and whether he exercised such care as a reasonably cautious person of that age, would exercise under the circumstances and conditions which prevailed at that time. The jury found against the appellant on this question. We cannot say, that the jury's finding was not warranted by the evidence; or that the finding was manifestly against the weight of the evidence in the case. It is assigned as error, that the court admitted in evidence the amount of the hospital bill of $105.00, which had been paid by the father, and for which the father had become liable in connection with appellee's injuries. But whatever error, there was in the admission of this testimony, which related to a definite

amount, was cured by the remittitur of the same amount from the verdict. T. W. & W. Ry. Co. v. Beals 50 Ill. 150; Chicago City Railway Co. v. Gemmill 209 Ill. 638. Complaint is made by the appellant to the giving of the 8th instruction, which refers to the measure of damages. It is insisted that under this instruction the jury could allow damages for loss of time, and loss of earning power, during the appellee's minority. We are of opinion, that no such inference could be reasonably drawn from the wording of the instruction; the instruction is clearly limited to the com-

pensation for the injuries which the evidence shows the appellee suffered or would suffer if any, as the result of the collision with appellant's automobile and was limited also by the allegations in the declaration. The criticism made to the giving of Instructions No. 1 and 6, are not well taken. Taking the instructions altogether for appellee and appellant, we are of opinion, that they state the law concerning the matters of negligence, and contributory negligence involved in the case, with substantial correctness. We find no error in the refusal of appellant's instructions; and no error is specifically pointed out in the brief. It is sufficient to say concerning the question raised of improper or prejudicial arguments made to the jury by appellee's counsel, that these questions cannot be raised for review by ex parte affidavits; Barnett v. Barnett 188 Ill. App. 32; People v. Vall 242 Ill. 284; Clark v. The People 224 Ill. 554. It is also contended that the amount of the damages recovered is excessive. Taking into account the fact, that the appellee received a permanent injury; and that he must have suffered much pain and distress, the amount of the judgment cannot be regarded as excessive.

The record does not disclose any reversible error; and judgment is therefore affirmed.

Affirmed.

Opinion filed July 10, 1922

General No. 7353 Agenda No. C2

October Term A. D. 1921

Rufus M. Potts, Insurance Superintendent of the State of Illinois, Defendant in Error,

vs.

Assured's National Mutual Fire Insurance Company, Plaintiff in Error.

Error to Sangamon.

NIEHAUS, J.

This cause is heard upon a writ of error issued to review a decree of the circuit court of Sangamon county approving the report of the receiver J. C. Lyons, who had been appointed in the case of Rufus M. Potts, Insurance Superintendent of the State of Illinois v. Assureds National Mutual Fire Insurance Company, Plaintiffs in Error herein, and who had taken charge of the assets and personal property of the Insurance Company mentioned, and filed the report in question asking to be discharged as such receiver.

Objections to the report were filed by the Plaintiff in Error; and the objections filed, and the matters involved therewith, were referred to a special master, who heard the evidence concerning the objections. While this matter was pending before the master, the parties to the controversy made a settlement, which was reduced to writing and executed under seal. The master thereafter made his report, in which he found, that the receiver did not preserve or conserve the assets of the Plaintiff in Error; and that he performed his duties as receiver in such a negligent careless and wanton manner, as to cause destruction and loss of much of the property and assets of Plaintiff in Error. He also reported, that the Plaintiff in Error and the Receiver, had made a settlement of the matters in controversy, which was evidenced by a written instrument under seal; and which released the receiver from liability concerning the loss suffered by the

Plaintiff in Error, because of the mal-administration of the receiver concerning the property placed in his charge by the order of the court; and that this written instrument and release, which is set out in the report, was fully fairly and voluntarily entered into by the Plaintiff in Error, and operated as a release of said receiver from liability. Objections and exceptions were filed to the report

of the master, which were heard by the court, and overruled; and the court thereupon entered a decree approving the final report of the receiver and discharging him, and also discharging his bondsmen from all further liability on the receiver's bond.

It is contended by Plaintiff in Error that the release executed by the parties to this controversy was invalid; and should have been set aside by the court; and that the objections and exceptions which it filed to the master's report should have been sustained by the court. A contention is also raised in the case, concerning certain acts of the receiver in allowing the names of the policy holders in Plaintiff in Error's Company to be given to a rival insurance company; and that this act of the receiver resulted in loss of Plaintiff in Error's business. It is sufficient to say concerning the latter contention, that this was not a question properly arising on the approval of the receiver's report, which was necessarily limited to the matter of the restoration to the Plaintiff in Error of the physical and pecuniary assets and chattel property of the Plaintiff in Error, which had been placed in charge of the receiver by the court. And we are of, opinion also, that the findings of the master, and the decree of the court should have been limited to these matters. We find that the evidence fully sustains the finding of the master, that the release in question was executed as the free and voluntary act of the parties, and binding; but it should in this case be held to effect only the matters referred to. The objections and exceptions marked two and three, should have been sustained; the finding embraced in No. two, that the receiver made full restora-

ton of the whole of the property and assets of the company or their equivalent, was erroneous; also the findinfi that the Plainitff in Error had no valid claim against the receiver, and that such receiver should be dscharged from all further liability, together with his bondsmen; which should have been limited to the matters contained in the receiver's report. We are of opinion, that under the evidence in the case, the decree in its findings should also have been confined in discharging the defendant from liability, to the assets and property embraced in the receiver's report, and the pecuniary and physical assets of which he had charge; and that therfore, the decree should be modified, so as to exclude a determination of liability con-

cerning other matters.

For the reasons stated, the decree is affirmed insofar as the approval of the receiver's report is concerned, and his discharge as receiver; but the finding which releases and discharges him and his bondsmen from all liabilities and obligations whatsoever to the Plaintiff in Errror, is reversed; and the cause is remanded with directions to modify the decree, limiting the discharge from liability of the defendant and his bondsmen, to the matters embraced in the receiver's report, and the property and assets therein specified.

Reversed in part, and remanded in part, with directions.

(27) Opinion filed July 10, 1922

General No. 7366 Agenda No. 16

October Term A. D. 1921

Ensel, Meyer & Company, Defendant in Error

vs.

James C. Davis, Director General of Railrooads, etc., Plaintiff in Error.

Error to Sangamon.

227 I.A. 6182

NIEHAUS, J.

This suit was brought by Ensel, Meyer & Company against James C. Davis, Director General of Railroads, operating the Chicago & Alton Railroad Company, a common carrier, to recover damages for a breach of contract relating to the transportation and delivery of a shipment of whiskey on or about February 7th, 1919. The wet goods in question were received by the plaintiff in error at Peoria for transportation to Springfield, Illinois. The declaration which consists of nine counts, alleges seperate shipments; and charges that certain quantities of whiskey were received by the defendant in the suit as a common carrier, to be carried for the plaintiff in the suit to Springfield on the railroad referred to; and that the defendant was guilty of a breach of the carrying contract by failing to deliver the shipment to the plaintiff at Springfield. The defendant in defense of the suit, filed the general issue to the declaration, and two special pleas in bar. A demurrer was sustained to the special pleas; the defendant thereupon withdrew the general issue, and stood by his special pleas; a default was entered; and subsequently a stipulation entered into between the parties by which it was admitted that the shipments were made as charged in the declaration, namely, by the plaintiff to itself at Sprnigfield as alleged in the various counts of the declaration; that the packages containing the merchandise in question were re-

ceived in good condition and not delivered to the plaintiff; and that the freight charges were paid thereon by the plaintiff. Evidence concerning the amount of damages sustained by the plaintiff was heard and submitted to the jury, which returned a verdict assessing the plaintiff's damages at $616.25; and the court rendered judgment against the plantiff in error for the amount found by the jury. The defendant prosecutes this writ of error to reverse the

judgment.

One of the grounds urged by the plaintiff in error for reversal of the judgment is, that the court erred in sustaining a demurrer to the special pleas. Both special pleas presented practically the same character of defense, namely, that the contract of shipment which was entered into by the plaintiff in the suit and the defendant, was a part of a scheme or plan of the plaintiff for delivery of the intoxicating liquor contained in the shipment to itself for the purpose of subsequent sale in anti-saloon terrtory. Also, that the plaintiff in the making of the contracts declared on, for the carriage of intoxicating liquors to itself at Springfield, did so with the intention of making delivery thereof to purchasers at Springfield in anti-saloon territory. There is no statement in the pleas that the defendant had any knowledge or information at any time of the alleged plan or scheme referred to, and the pleas do not specify what plan or scheme the plaintiff had, nor do they aver, that the defendant had any knowledge of an intention of the plaintiff to sell the liquor in question in violation of the anti-saloon territory act, nor had any knowledge of any facts showing such intention; it is apparent that the averments in the pleas represent merely the pleaders conclusions without stating the facts upon which such conclusions were based. A mere intention to violate a law is not a violation of law, especially

in a matter of the violation of a statute, which makes certain acts if committed an offense, regardless of the intention of the person committing the unlawful acts; and this applies with peculiar force to a case like the present one, where the party charged with the evil intention was never in position to have carried it into effect, because he never received the liquor with which he, it is alleged he intended to commit the offense. The pleas in question contain no averments that plaintiff said or did anything concerning this shipment from which the inference could be reasonably drawn that he intended to violate the anti-saloon's law referred to, either by having made sales thereof which were prohibited, or made any agreements to deliver the liquor to purchasers, who had no legal right to purchase the same within the prohibited territory. Mere conclusions are not legally sufficient as a matter of pleading. Willard v. Zehr, 215 Ill. 148. For the reasons stated, the demurrer to the

pleas was properly sustained.

Another ground urged for reversal of the judgment is, that under the evidence concerning the market value, there could only be a recovery of nominal damages; that the evidence concerning the market value of the liquor, was insufficient; that there could be no market value of a commodity at the place of delivery, inasmuch as the sale at that place is illegal. Concerning market value, the witness Ben Meyer who had been in the liquor business for many years preceeding the trail, had been in the wholesale liquor business at Springfield, at Lincoln, and at the time mentioned, was in the same business at Peoria, was asked the following question: Q: What was the fair cash value per gallon of 41 gallons of Fay whiskey at the place of delivery. This question was objected to, "inasmuch as the stipulation shows that the place of delivery was anti-saloon territory; and inasmuch as under the local option act it was unlawful to sell intoxicating liquor in

Page 3

Springfield, the place of delvery, and at the time that the delivery should have been made there could have been no market value of whiskey in Springfield at that time. That there could be no market value of a thing which is forbidden to be sold." The Court over ruled the objection, whereupon the question was repeated as follows: "What was the fair cash market value in Springfield, the place of delivery?" This was objected to on account of the fact, that the court judicially knew the statute, judicially knew by this stipulation, that Springfield the place of delivery, was anti-saloon territory; judicially knew that it was unlawful to sell intoxicating liquors in anti-saloon territory; and therefore it could have no market value in Springfield. This objections were also overruled. We are of opinion that the objection was properly overruled. It was evidently based on the erroneous assumption, that because Springfield at the time in question was anti-saloon territory, no sales of any kind could therefore be legally made, and hence there could be no market for the sale ofi ntoxicating liquors. In the case of Jacksonville v. C. & A. R. R. Co., the Supreme Court in discussing this point, said: "The Act expressly recognizes the right of property in intoxicating liquor. It makes its sale unlawful in territory which by vote of the people has become anti-saloon territory, but even in such territory intoxicating liquor may

still under certain conditions be manufactured owned used and sold." Jacksonville v. C. & A. R. R. Co. 274 Ill. 152. But assuming that counsel is correct in his position, that the evidence as to market value at Springfield is not clear and explicit, there is sufficient evidence in the record, from which the jury could ascertain with reasonable certainity the market value at Springfield. It was proper under the circumstances suggested by counsel, in determining the question of market value, to take into considera-

tion the evidence of the market value of the liquors at Peoria, from where it was shipped. "If property has a market value at the place involved in the inquiry, evidence is properly directed to establishing it at that place. Where the issue involved relates to the sale and delivery of goods, evidence of value is properly directed to value at the place of delivery, but unless the evidence is clear and explicit as to the value of the article at the place of delivery, evidence of value at other places may be received. Where it is affirmatively shown that no market value for a commodity exists at the place involved in the inquiry, market value at otheir places may be shown, if these are sufficiently near to show, in connection with cost of transportation, etc., the value at the place in question." 22 Corpus Juris 189 Sec. 153.

The record does not disclose any reversible error; and the judgment is affirmed.

Judgment affirmed.

Mr. Justice Graves dissenting.

Opinion filed Oct. 10, 1922
Rehearing denied Oct 4, 1922

General No. 7377 Agenda No. 26

October Term A. D. 1921

Frank C. Jones, Appellee,

vs.

A. H. Hughes, Appellant.

Appeal from Sngamon.

NIEHAUS, J.

This is an appeal from judgment in favor of Frank C. Jones ,the appellee, in the circuit court of Sangamon county, in a forcible entry and detainer suit, instituted by the appellee, to recover the possession of certain premises occupied by the appellant A. H. Hughes, under a lease from J. J. Wilmert, the owner of the premises in question. The lease to the appellant was made on the 1st day of March 1920; and expired on the 28th day of February 1921. In the mean time, on the 24th day of August 1920, Wilmert entered into a written agreement with the appellee by which he agreed to sell and convey the premises in question to him, which agreement was to be executed and carried into effect, on the 1st of March 1921. But the time was afterwards extended to January 1st, 1922. Wilmert also assigned to the appellee, the lease in question, under which appellant had possession of the premises. And in connection with these transaction between Wilmert and the appellee, it was verbally agreed, that the appellee should have possession of the premises, on the 1st day of March 1921. Shortly before the expiration of appellant's term, the appellee had a conversation with him, in which the appellant indicated to the appellee, that he probably would not be ready to deliver possession to him on the 1st of March; and on the 1st of March after the appellant's term had expired, the appellee had another conversation with the appellant, to induce him to deliver possession of the premises at once; and the appellant insisted, that he could not do so until later on, for certain reasons which he gave at that time. Under this state of facts,

which the evidence in the record discloses, the court directed a verdict in favor of the appellee. It is contended by the appellant, that this was error. We are of opinion, that the appellee under the facts and the law, was entitled to a verdict and judgment. Under the agreement which the appel-

lee had with Wilmert, the owner of the premises, the appellee was entitled to take possession on March 1st, 1921; on that date the appellant still held possession of the premises, although his term had ended February 28th, and refused to deliver possession to the appellee. Under the forcible entry and detainer act, the person entitled to the possession of lands has the legal right to maintain the action; and under Sec. 2 Par. 4 of the act mentioned, the appellee could legally maintain this suit, to recover the possession that he was entitled to, of the premises, under his agreement with Wilmert. The fact that the agreement for possession was verbal, did not deprive him of this right. A verbal agreemnt for possession under the facts presented was legal and binding. Allen v. Webster 56 Ill. 393. Moreover, the appellant was not in position to question the legality of the verbal agreement. The appellant, by virtue of Sec. 12 of Chap. 80 of the act concerning landlord and tenant, was legally bound to surrender possession at the expiration of his term, namely on February 28; and his possession on March 1st, and thereafter was therefore wrongful, as to the appellee, to whom the landlord's right to retake possession of the premises had been transfered.

Judgment is affirmed.

Judgment affirmed.

General No. 7396 Agenda No. 65

October Term A. D. 1921

Albert J. Meier, Appellant

vs.

George G. Moore, Appellee

Appeal from Vermilion.

NIEHAUS, J.

This is a suit in assumpsit, commenced by attachment, by the appellant Albert J. Meier in the circuit court of Vermilion county, against the appellee George G. Moore ,to recover on a promissory note, made by the appellee for the principal sum of $10,000. and interest. There was a trial by jury; and a verdict and judgment in favor of the apellee. This appeal is prosecuted from the judgment. It was pleaded in defense of the action to recover on the note, that the consideration for which the note had been given, had failed. The evidence shows that the note, with other notes, had been made by the appellee to the appellant for the purchase price of 106,250 shares of stock which appellant owned in the Missouri Metals Corporation. The evidence also shows that an agreement was made in connection with the making of the notes in September 1918, by which the appellee was to become the owner of the stock referred to, under the following circumstances: The appellee was a resident of New York, and the appellant lived in St. Louis. At the instance of the appellant, who was desirous of selling his stock, F. E. Butcher, then also of St. Louis, and who had been connected in business with both parties, undertook to negotiate a sale of the stock to the appellee; and for that purpose, after having arranged for a meeting by the telephone communication went to New York to see the appellee; and had a conference with appellee, which resulted in the agreement by appellee to purchase appellant's stock. Appellee's testimony, as to what occurred between him and Butcher concerning this agreement to purchase, is as follows: "When Mr.

Butcher came to see me, in New York in 1918, he telephoned me a few days before, and he referred to his telephone conversation, and said Mr. Meier would sell his stock at 50 cents per share, and take his pay in notes. I told him I wouldn't think of buying the stock

because it was worthless, the company was insolvent; I was a large creditor, and other large claims against it; but that if the trade which had been on with the St. Joe Lead Company, were completed, so that there would be enough to pay the debts, I would be willing to complete the purchase; I would sign the notes, and give them to him with that understanding. I told him I was going abroad in three or four days. So that he would known thoroughly what the trade was, with the St. Joe Lead Company, I had him see Messrs. Davis and Connell, lawyers acting in it, also arranged to call Mr. Crane, president of the company, so that he would have complete details of the trade. I also arranged that Mr. Butcher should be completely informed of the trade, as it progressed; I told Mr. Butcher I wanted him to get in touch with both the lawyers, and Mr. Crane, so that he would know. Mr. Crane is president of the St. Joe Lead Company, and promotor of, and negotiating the trade; I told him the only reason I would think of buying the stock was in the event that the St. Joe Lead Company completed it." Butcher, who was a witness in the case, corroborated the testimony of the appellee concerning the conditions under which the appellee agreed to buy the stock, and under which the appellee executed the notes, and gave them to him on this purchase. Butcher took the notes, and after returning to St. Louis, delivered them to the appellant apparently without informing the appellant of the conditions under which he had received them. It was a contested question of fact on the trial, whether the agreements for the purchase of the stock by the appellee, was as testified by the appellee, or was made upon the terms, which had been proposed by the appellant. The jury by their verdict found in favor of appellee on this question. It is contended by the appellant, that the verdict is against the weight of the evidence. We cannot agree to this con-

tention. The evidence in the record fully warranted the conclusion reached by the jury. If the agreement to purchase the stock was as claimed by the appellee, the appellant has no right to recover, because the purchase of the stock was conditioned upon the proposed agreement or trade with the St. Joe Lead Company becoming effective. But aside from this matter, it is clear from the evidence that no agreement for the purchase of the stock, was never

consummated; and that whatever was said or done about the matter, it did not result in an actual sale; and that appellant retained the ownership and possession of his stock. The appellee never received the property, in part payment and consideration of which, he gave the note in question; and it is therfore evident, that the consideration for which the note was given, failed. The verdict of the jury, upon the issue of failure of consideration, is fully sustained by the evidence.

We find no reversible error in the introduction or rejection of evidence on the trial; nor in the instructions given for appellee, nor in the refusal to give the instructions contended for by the appellant. The judgment is therefore affirmed.

Affirmed.

27 | 4

Opinion filed July 10 - 1922
Rehearing denied Oct 4 1922

General No. 7399 Agenda No. 44

October Term A. D. 1921

Faber-Musser Co., Appellant,

vs.

Wm. E. Dee Clay Mfg. Co., Appellee.

Appeal from Sangamon.

NIEHAUS, J.

In this case the appellant Faber-Musser Co. commenced suit in the circuit court of Sangamon county against the appellee William E. Dee Clay Manufacturing Company, to recover damages for an alleged breach of a contract to deliver to the appellant a large quantity of fire brick. There was a trial by the court; and a judgment was rendered barring the appellant from any right of recovery under the contract; and this appeal is prosecuted from the judgment.

Appellant's right to recover depends upon whether the contract involved, which was made by Matthew M. Dee, acting as agent for the appellee, was binding, and legally effective without a subsequent ratification or acceptance, by the appellee. If Matthew M. Dee, as agent had authority, either as a matter of fact, or as a matter of law, to bind the appellee, the contract was binding without any subsequent approval or acceptance by the appellee. In this case the authority of the agent presented a question of law. Where the authority is implied from a certain state of facts, it becomes a question of law; Doggett vs. Greene 254 Ill. 134; and whether authority to bind the appellee, should be applied as a matter of law from the state of facts proven in this case, was passed upon by the Supreme Court on a previous appeal: Faber-Musser Co. v. Dee Clay Co. 291 Ill. 240. It was there held in effect, that under the facts proven, Matthew M. Dee's authority to bind the appellee by the contract in question, was implied as a matter of law, and that the contract should have

been admitted in evidence as the contract of the appellee. If therefore, the contract must be considered as appellee's contract, (there being no question of a breach of the contract) it follows, that appellee has a right of action thereon for its breach; and

that the court erred in entering a judgment barring such action. The judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

Opinion filed Sept. 16-1922

General No. 7367 Agenda No. 2

October Term A. D. 1921

Lorena Reid, by Izora Reid, her Guardian,
Defendant in Error

vs.

James C. Davis, Director General of Railroads, as Agent etc., successor to and substituted for Walker D. Hines, formerly Director General of Railroads and John Barton Payne, formerly Director General of Railroads, as Agent, etc.
Plaintiff in Error

Error to Menard County.

227 I.A. 619

HEARD J.

This case is before this court upon a writ of error to review a judgment of the circuit court of Menard county in favor of defendant in error, hereinafter called the plaintiff, against plaintiff in error, hereinafter called the defendant, for $2,000 damages alleged to have been sustained by plaintiff in a collision between a freight train of defendant and a trackman's gasoline motor driven speeder upon which she was riding on the tracks of the C. & A. R. R. within the limits of Tallula, a village of about 700, inhabitants.

The C. & A. R. R. runs from the depot in Tallula in a southwesterly direction and in the southwesterly portion of the town there are three tracks on the right of way, the main track, a passing track and running off from the passing track an elevator side track.

To go in upon the passing track a train must run southwesterly from the depot to the switch points, which are about 1600 feet from the depot. The place where the switch points are located is in the sparsely built up part of the village. For a long time before the accident, a freight train had been arriving at Tallula from the north and "tying up" for the night on the passing and elevator tracks.

In order to run in on these tracks it was necessary to run down past the switch points and then run back northeasterly on the passing track.

At about 9:55 P. M., Aug. 20, 1919, this freight train arrived at Tallula from the north, did some business at the station, and a little before 10 o'clock started southwest down the track to go in on the side track to

"tie up" for the night.

The engine was headed southwest, but there was a box car being pushed in front of it, and there is a conflict of testimony as to whether the headlight was burning. The survivors of the accident, who were with the plaintiff on the speeder, all testify that it was not, while all the other witnesses testify that it was.

The train crew testify that on leaving the station the whistle was blown and the automatic bell was set in motion and continued to ring up to and after the time of the accident. The train proceeded southwesterly and as the engine passed over the switch points the steam was shut off and the train was "drifting" to get the rear car just far enough down to back in over the switch points, there being no occasion to go any farther than that, and when the rear end of the freight train was a short distance north of the switch points the front of the train collided with the speeder on which plaintiff was riding, and as a result of the accident she was severely injured.

The speeder was an old hand car propelled by a gasoline engine with which it had been equipped and was for the use of the section men during working hours, but had been used on several occasions by the section foreman and other section men on their personal business in going to Ashland which is about five miles distant from Tallula at the intersection of the C. & A. and B. & O. lines. This use, however, was against defendants rules and had been strictly forbidden and there is no evidence that the crew of the freight train had any knowledge of such use.

On the evening of August 20, 1919, with the acquiescence of the forman, John W. Reid took the motor car and inviting his daughters Anna and Lorena the girl for whose injuries the suit was brought to go with him left Tallula at about 8:30 o'clock P. M., to go to Ashland to meet Wiley Potter, a section man, Mrs. Potter and Mrs. Austin, who were due in Ashland on the B. & O. passenger train from Springfield between nine and ten o'clock P. M., in order to bring them to Tallula that night. They left Ashland shortly before ten o'clock P. M., and on their return trip collided with the freight train not becoming aware of its presence until the instant of the collision. The freight crew was not aware of the presence of the speeder until after the collision.

The speeder party were at best licensees being upon

the track with the speeder contrary to defendant's orders and the only questions involved in this case are the duty of defendant toward plaintiff at the time and place of the accident and whether or not defendant failed in the performance of such duty.

It was sought to bring the case within the line of cases holding a railroaid liable to trespassers for wilfulness for the reason that there had been such a notorious use of its right of way as a foot path as to impose some duty of anticipating the presence of persons on the track who might be injured, and some use of the track between Tallula and the water tank about 450 feet beyond the place of the accident, by foot passengers who were members of the Tallula Fishing Club, going to and from a pond which lies about 450 feet north of the northwesterly right of way line on the land of an adjoining owner, was shown. Much evidence was heard upon the subject and much space is devoted in the briefs and arguments of the parties as to the duty of defendants towards such members of the fishing club. A determination of whether they had any rights in the premises and, if so, what the rights of such foot passengers who if upon or near the track would be walking slowly and could readily step to one side upon the approach of the freight train would throw out little light upon the question of defendant's duty towards the occupants of the speeder whose progress was confinded by the rails and whose approach was not only not to be reasonably expected, but whose presence there under the circumstances was unauthorized.

In Neice vs. C. & A. R. R. Co. 254 Ill. 595, it was said: "Upon the right of way of the railroad where the public are not invited or authorized to go for the transaction of business with the railroad company, those in charge of the train must have knowledge both of the presence of the trespasser and of his dangerous situation, but depot grounds and platforms provided for the use of the public in the transaction of its business, where persons have a right to be for legitimate purposes and where they may reasonably be expected are quite different. If they are there for a legitimate purpose in connection with the business of the company they have a right to demand the exercise of reasonable care for their safety. If they are simply idlers, loiterers or trespassers the duty of the company is only to abstain from wilfully or wantonly injuring them."

In G. & C. U. R. R. Co. vs. Jacobs, 20 Ill. 478, it was said: "The plaintiff can derive no support or advantage from the fact that the employees of the railroad, with their families and children residing within the enclosure were permitted by the company free ingress, egress and regress in and upon their track and land. This was a permission to special persons, for the benefit and necessities of the road, and cannot be extended to those not in this relation to the company."

Under the circumstances of the present case the only duty defendant owed plaintiff was the duty to abstain from wilfully or wantonly injuring her. It is contended by plaintiff that Berier vs. I. C. R. R. Co. 296 Ill. 464, is authority for finding defendant in this case guilty of wilful or wanton conduct. The facts in the Berier case vary greatly from the facts in this case. In that case it was stated "Here the engineer admits that when he was less than a block from these women he saw them walking directly in front of a heavy and fast moving train. He gave them no warning and made no effort to stop his train. When they were on the east rail of his track scarcely more than 100 feet from him, he failed to give them warning, but raising his eyes from them, allowed his engine to move on towards them, not knowing whether they realized their danger and not taking into account that they might become panic stricken when they found themselves between two passing trains." In that same case the court also said: "To constitute a wanton act the party doing the act, or failing to act, must be conscious of his conduct and, though having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.'

In Covert vs. R. I. Ry. Co. 299 Ill. 288, it was said: "Wlful negligence implies an act intentionally done in disregard of another's rights, or an omission to do something to protect the rights of another after having had such notice of those rights as would put a prudent man upon his guard to use ordinary care for the purpose of avoiding injury to such other person."

There is no evidence in the record to show that defendant's servants had any notice whatever that plaintiff was in a place of danger and no evidence that they were conscious from their knowledge of surrounding circumstances an existing conditions that their conduct

would naturally or probably result in injury.

We are of the opinion that the evidence fails to show that

Page 4

defendant failed to perform the duty it owed plaintiff of refraining from wilfully or wantonly injuring her and that the judgment of the circuit court should be reversed.

FINDING OF FACTS.

We find that at the time of the accident in question defendant was not guilty of wilful or wanton negligence and that at the time of the accident plaintiff was not upon the right of way of defendant at defendant's invitation either express or implied.

Page 5

(9746)

Opinion filed July 10-1922

General No. 7392 Agenda N. 64

October Term A. D. 1921

Lewis K. Pearl, as Administrator of the Estate of Hazel Bernice Pearl, Deceased, Defendant in Error,

vs.

William J. Jackson, as Receiver of the Chicago & Eastern Illinois Railroad Company, Plaintiff in Error.

Error to Vermilion.

227 I.A. 102

HEARD, J.

Lewis K. Pearl as Administrator of the estate of Hazel Bernice Pearl, deceased, brought suit in the circuit court of Vermilion County against plantiff in error to recovery pecuniary damages alleged to have been sustained by the next of kin of the deceased by reason of her death which was the result of a collision between a passenger engine of Plaintiff in Error and an automobile, driven by Lewis K. Pearl, father of deceased, in which deceased was riding, at a place where Plaintiff in Error's railroad tracks cross one of the public streets of the Village of Alvin.

One of the material questions in the case was whether or not a bell was rung or whistle sounded in compliance with the statute prior to the accident. Harold Klauson, fifteen years of age, testified in behalf of defendant in error that he saw the train coming around the bend north of the place of the accident and that he heard it whistle for the first crossing and then heard it whistle the danger whistle.

Nora Klauson, mother of Harold, testified that she was present at a conversation, which she said occurred the afternoon of the day before the trial, between Harold Klauson and Mr. Wicks one of the attorneys who was engaged in trying the case for defendant in error, and that Mr. Wicks told the boy that if he testified that the train whistled he would be put in jail.

Mr. Wicks was not called as a witness to deny this statement, but in his opening argument to the jury said "when Mrs. Klauson told my conversation with the boy she committed perjury," thus getting before the jury as evidence, under the guise of argument, his unsworn denial of Mrs. Klauson's testimony in language more emphatic than he would have been allowed to use upon the witness stand. Upon objection to the statement being made to the

court by counsel for plainiff in error, the court did not rebuke Mr. Wicks but only said "counsel will have to confine himself to the evidence.

The conduct of the attorney in making this statement was highly improper and could not be otherwise than prejudicial to plaintiff in error as the effect of Mr. Wick's denial of Mrs. Klauson's testimony could not be eradicated from the minds of the jury by the Court's mild admonition to confine himself to the evidence.

Every litigant is entitled to a fair and impartial trial. Where misconduct of an attorney is prejudicial to the appellant, courts of review will reverse the judgment and remand the case. Wright vs. Upson, 303 Ill. 118.

Other questions are raised upon the record, but as they are not likely to arise upon a retrial of the case we refrain from discussing them.

The judgment is reversed and the cause remanded.

(2474)

Opinion filed July 10-1922

General No. 7394 Agenda No. 40

October Term A. D. 1921

Alexander Brown, Appellee

vs.

Fernandes Grain Co., a Corporation, Appellant

Appeal from Sangamon.

227 I.A. 619

HEARD, J.

In this case the Appellee, A. C. Brown, hereinafter called the plaintiff, brought an action of assumpsit against the appellant, Fernandes Grain Company, hereinafter called defendant, for the balance claimed to be due upon nineteen car loads of wheat theretofore shipped by the said plaintiff to the defendant. The defendant pleaded the general issue and certain special pleas in the nature of a set-off. The pleas of set-off alleged that during the summer of 1920, the plaintiff and the defendant entered into seven separate and distinct contracts, whereby the plaintiffs had contracted to sell and did sell to the defendnt in all, some 33,500 bushels of wheat at certain designated prices; that the first six of said contracts had been completely filled by the plaintiff and a portion of the seventh, but that by reason of the refusal of the plaintiff to complete the seventh contract, the defendant had sustained loss equal to or greater than the amount claimed by the plaintiff. For replication the plaintiff denied the making of said seventh contract and further alleged that, if the same had been made, it not being in writing, and being for an amount in excess of the value of $500.00, and there being no part performances thereunder, the same was void under the Statute of Frauds. To that replication the defendant rejoined, alleging part performance, in that the plaintiff had in fact delivered some 150 bushels of wheat on said seventh contract, but that he refused to complete the same.

Upon these respective allegations the parties came to issue, by the filing of the last pleading on April 15, 1921. The cause was called for trial and trial was begun on April 20, 1921, After the jury had been duly selected and the cause heard in part, the plaintiff asked and obtained leave to withdraw his replication and all subsequent pleadings and to demur to the defendant's plea of set-off. Over the objection of the defendant this application was allowed. Thereupon the Court sustained plaintiff's demurrer's to all Pleas of set-off, and the cause

thereafter proceeded upon the declaration general issue and the replication thereto. At the conclusion

of all the evidence the court upon motion of the plaintiff instructed the jury to return a verdict for the plaintiff for $2388.24, the amount claimed by him and this was accordingly done. A motion for a new trial on the part of the defendant was subsequently overruled and judgment entered on the verdict. From that judgment the defendant brings this appeal.

It is claimed by defendant that the court erred in allowing plantiff to withdraw his replication and demur to the pleas of set-off. In a civil suit changes in the pleadings may be allowed, by the court, to be made upon such terms as are just and reasonable at anytime before final judgment and there was no error in allowing the changes in the pleadings to be made.

It is contended by the defendant that the court erred in sustaining the demurrer to defendant's pleas of set-off. The seven contracts alleged by defendant to have been made are alleged in the pleas to have been seven distinct and seperate contracts and it attempted by the pleas to set-off unliquidated damages alleged to have been sustained by defendant by reason of a breach of the seventh of such contracts against claims of plaintiff arising out of six other disstinct and seperate contracts. It is the settled law of this state that unliquidated damages growing out of a breach of a contract other than that sued upon cannot be set-off in a civil action. Ewen vs. Wilbur 208 Ill. 507; Higbee vs. Rust, 211 Ill. 333. The court therefore, properly sustained the demurrer to the pleas of set-off.

It is contended by defendant that the court erred in instructing the jury to assess the plaintiff's damages at $2,388.24, the full amount of plaintiff's claim.

The plaintiff resides at Carlinville, in this state and is in the elevator business, and the defendant is a corporation engaged in the business of buying and selling grain, with its principal place of business located at Springfield. During the summer of the year 1920, it is agreed that the parties entered into a number of contracts whereby the plaintiff sold and contracted to sell various quantities of wheat to the defendant. The plaintiff says, that there were six of such contracts and that the total amount of wheat which he so contracted to sell to the defendant was 28,500 bushels. Each of said con-

tracts or agreements specified the amount of wheat contracted for, the price per bushel, which in each case depended upon and varied somewhat according to the time when shipment

Page 2

should be made, and the freight rate basis.

The making of said six contracts was not in dispute. The first known as Contract No. 5257 was made on June 29th; the second, Contract No. 5391, was made on July 13th; the third, Contract No. 5433, on July 16th; the fourth, Contract 5520, on July 21st; the fifth, Contract 5553, was made on July 28th, and the sixth, or Contract No. 5560, was made on July 29th.

The existence of a seventh contract is one of the disputed issues in this case. The defendant introduced evidence tending to show that such contract was in fact made, the same being known as Contract No. 5585; that the same was made by telephone on July 31st, 1920, and was for the sale by the plaintiff to the defendant of 5,000 bushels of number one wheat at the price of $2.17 per bushel, if delivered at any time between the first and fifteenth of August then next; or the price of $2.14 per bushel if delivered bewteen the sixteenth to the thirty-first, inclusive, of said month of August; or the price of $2.08 per bushel if delivered at any time bewteen the first and fifteenth of September, then next, free on board, Carlinville, and upon the basis of a freight rate of twenty-six and one-half cents per hundred weight to New Orleans, La.; that this freight rate basis means that the bids at the time of the making of each of these contracts were made to guard against change in freight rates; that the buyer would pay the freight, but if at the time of the shipment the charge therefor should exceed the rate selected as the basis, the seller should pay the difference; if on the other hand the rate at the time of the shipment should be less than the assumed rate the difference would be credited to the seller and that the buyer had a right to send the grain to any other port on that basis.

It is contended by plaintiff that even if the 7th contract were made, it being a contract to sell goods of the value of over $500 it is not enforceable by reason of the provisions of Sec. 4 of Chap. Rev. Stats. Ill., known as the uniform sales act which provides that:: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be

enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted

to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment,, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Sim Fernandes, president of defendant, testified that there is a well recognized and established custom with respect to the application of cars among outstanding contracts. The custom is to fill up all contracts. If the shipper gives directions as to how they are to be filled, these directions are compulsory; that in the absence of any directions on the part of the shipper, the buyers, say as to how the application should be made.

Contracts made in the ordinary course of business are presumed to have been made with reference to any existing usage or custom relating to such trade. El Reno Grocery Co. vs. Stocking, 293 Ill. 494.

The six contracts concerning which there is no dispute were for the shipment of 28,500 bushels of wheat and the evidence shows that 28,654 bushels and 33 pounds of wheat were shipped by plaintiff and Fernandes testifies that defendant, by right of the custom above mentioned, applied this 154 bushels and 33 pounds upon the 7th contract as part performance of the same. Plaintiff denied the making of the 7th contract and refused to fill the same.

The evidence shows that wheat increased in price and that if the alleged 7th contract was made the defendant was damaged to ac onsiderable amount by its breach.

A portion of plaintiff's claim in this case was for the purchase price of the 154 bushels and 33 pounds of wheat. If the 7th contract was made 154 bushels and 33 pounds of wheat were delivered by plaintiff to defendant on such contract and the same was received by the defendant as part performance of such contract, then under the plea of the general issue defendant had a right, as against the purchase price of said 154 bushels and 33 pounds of wheat but not as against plaintiff's claim growing out of the other six contracts, to recoup any damages he may have sustained by reason of a breach by plaintiff of the said 7th contract to the ex-

tent of plaintiffs claim for the price of said 154 bushels and 33 pounds.

Page 4

Upon a motion to direct a verdict the court cannot weigh the evidence, but the evidence with all the reasonable intendents and inferences arising therefrom are to be considered in its aspect most favorable to the party against whom the motion is directed.

We are of the opinion that the court erred in directing the jury to assess plaintiff's damages at the full amount of his claim.

The judgment of the circuitc ourt is reversed and the cause remanded.

Page 5

(2148)

Opinion filed July 10, 192
Rehearing denied Oct 4, 192

General No. 7397 Agenda No. 38

October Term A. D. 1921

H. O. Ware, Appellee,

vs.

John Lawrence, Appellant.

Appeal from McLean.

227 I.A. 619

HEARD, J.

This is an appeal from a judgment for $2500.00 in favor of appellee against appellant in a suit brought for personal injuries received by him by being struck by appellant's automobile on one of thei streets of the city of Bloomington.

Appellee testified among other things that about 9:10 or 9:15 P. M., daylight saving time on June 10, 1919, he was going from Normal to Bloomington on Main street; that it was just dusk between daylight and darkness; that he had no tail light or other signal light on his bicycle; that he had a flash light in his pocket, but did not use it; that he knew there was a car behind him; that he heard the car coming and got as close to the curb as he could; that he was running about six or seven miles an hour; that the first indication he had that anything was going to happen was when he felt the contact between the car and the rear part of his bicycle; that he then made an effort to throw himself toward the curb and get off on the right side of the bicycle; that his right foot stayed with the bicycle and his left caught on some part of the car and he was dragged a short ditsance when the wheel of the car passed over his right leg below the knee, tearing his right leg badly; that he "hollered" just as soon as he felt the contact; that he knew at least half or three quarters of the block that the car was behind him; that he heard the car coming; that he heard the noise of the car and the occupants talking when they were a couple of rods away; that he was driving along thinking of other things; that there were some large trees in the south end of the block which extended over the street, but he was south of the trees when the accident happened; that the automobile was not going fast, but it was going faster than he was; that the bicycle was rubber tired and made practically no noise; that he did not know the automobile was directly in back of him; that after hearing the automobile coming he did not look around until the

contact.

Appellant contends that appellee was guilty of contributory negligence prior to the collision and in quoting these excerts from appellee's testimony we do not wish to be understood as intimating any opinion on that question, but we have selected portions of his testimony unfavorable to himself to show that this was a case which required accuracy of instructiins.

At the request of appellee, the court gave the jury the following instruction: "The Court instructs the jury that if you believe from the preponderance of the evidence that plaintiff was injured by or in consequence of the negligence of the defendant as charged in the declaration; and that plaintiff at the time in question was in the exercise of ordinary care for his own safety, then you should find the defendant guilty and assess his damages at the amount you may determine from the evidence.' Appellee in his argument contends that no care was required except at the instant of collision and that any prior point of time is immaterial. By this instruction the duty of appellee to exercise ordinary care for his own safety being limited to "the time in question" the jury might easily be misled into a belief in appellee's contention, whereas, appellee, knowing that an automobile, a dangerous instrumentality was approaching him from the rear faster than he was going, was in duty bound, from the time of acquiring such knowledge to exercise an amount of reasonable care for his own safety commensurate with the known danger.

We are of the opinion that in this case the giving of this instruction was reversible error. The judgment is reversed and the cause remanded.

Opinion filed [illegible] 10, 1922

General No. 7411 Agenda No. 67

October Term A. D. 1921

St. Louis Brewing Association, a Missouri Corporation,
Appellee,

vs.

Adolph De Heve, Appellant.

Appeal from Sangamon.

HEARD, J.

This is an appeal from a judgment of $1,071.05 in favor of appellee against appellant in a suit brought to recover for consignments of beer alleged to have been purchased by appellant from appellee at East St. Louis in wet territory for shipment to Auburn in dry territory.

Beer was so shipped on seven occasions during the months of May, June, July, August and September, 1918 on written orders purporting to be signed by appellant.

The evidence shows that appellant cannot write and that the signatures to the orders in question was not his signatures and there was no direct evidence in the case that appellant authorized any person to sign his name to the orders or to act for him in the premises.

It is contended by appellant that the court erred in admitting in evidence over appellant's objection Plaintiff's exhibits 1, 2, 3, 4, 5, 6 and 7, which were the seven orders for the shipment of beer purporting to be signed by appellant. While it is true that the signatures were not signed by appellant, personally and he testified that he did not authorize any person to act as his agent in the matter, agency can be proved by other evidence. In Faber-Musser Co. vs. Dee Clay Co. 291 Ill. 240, it is said: "Circumstantial evidence is ordinarily competent to establish the fact or extent of agency. In case of doubt as to the extent of the agency and the authority to bind the principal reference may be had to the situation of the parties and property, usages of the country on such subjects, the acts of the parties themselves and any other circumstances having a legal bearing and throwing light upon the question."

As to the first five of these exhibits the evidence shows that appellant ratified his signatures to the orders, receiving and paying for the beer. Orders six and seven are in the same handwritng as the

first five orders

for which payment was made. The orders are all in the same form and character and the directions for shipping were the same in the two latter orders as in the five former ones. The station agent of the railroad over which the beer was shipped testified that appellant received all the consignments, took the beer from the cars and paid the freight upon the same. In addition to these facts three representatives of appellee testified that they presented bills for the two shipments to appellant and that he admitted the correctness of the accounts and promised to pay the same when he was able. In view of this evidence and other facts and circumstances we are of the opinion that the fact of the agency of thew rited of the orders and his authority to bind appellant were fully established by the evidence in the case and that the written orders in question were competent evidence.

It is contended by appellant that the judgment is not supported by any competent evidence. The evidence that appellant took the beer from the cars and when presented with a bill therefor admitted its correctness and promised payment if believed by the jury was sufficient to warrant a larger judgment than the one rendered.

Complaint is made of the giving and refusal of instructions by the Court. Some of appellant's refused instructions did not state the law correctly, some were inaccurate, while others assumed controverted questions of fact. The court did not err in this respect.

The judgment is affirmed.

Graves, J. took no part.

(21504)

Opinion filed July 10 1922

General No. 7416 Agenda No. 55

October Term A. D. 1921

Nina Dulin Russel, Appellee,

vs.

Frank L. Russell, Appellant.

Appeal from Macon County.

227 I.A. 620

HEARD, J.

This is an appeal from a decree of the Circuit Court of Macon County for seperate maintenance. The bill filed by Appellee alleged in substance that appellee and appellant were married October 3, 1918, and lived together until the 6th day of September, 1920; that complainant was compelled to abandon defendant because of a course of unkind, cruel and inhuman conduct toward her, specifically setting forth the cruel and inhuman conduct of which complaint was made.

Appellee also set forth in her bill that she was the sole owner of the homestead property occupied by the appellant at the time said bill was filed, and she prayed for a decree of seperate maintenance for her support and that of her child, and that the homestead property be decreed to be hers.

Appellant answered the said bill denying all the allegations of cruelty, therein specificially and alleged that the cause of abandonment arose wholly, not because of any faut of appellant, but through the parents of appellee, who desired their daughter to live with them. The answer also denied that she was the owner of the homestead property and denied that she is entitled to any relief in this suit.

Appellant also filed a cross bill setting forth that he purchased the homestead property on June 17, 1919, and that he at the suggestion of the appellee's father, permitted the title to said premises to be taken in the name of the appellee, as grantee; that the said grantee did advance to him a large portion of the purchase price but that it never was the intention of either the appellee or appellant that she, was the owner of said premises, but that she, was to hold said title as trustee for the appellant and he prayed that the court should find that he was the true and lawful owner of

said premises and that she be required by decree to convey said premises to him

upon his paying back to her the amount of money advanced by her to him, plus interest on same, from date of said advancement.

The cause was heard by the court and a decree was entered finding the wife was entitled to seperate maintenance; that she was a tenant in common of the home, she having contributed part of the purchase price thereof, also a common owner with the appellant of this home. The court found that she had contributed 26-33 of the purchase price and that appellant had contributed 7-33 of the same. Appellee and appellant could not agree upon the present vaue of the home and thereupon, with their consent, the court appointed appraisers to appraise the present value of the home, which appraiser reported that its present value was $7,000.00 The decree of the court was that the appellee was entitled to seperate maintenance, that the value of the property was $7,000.00, that the appellee contributed 26-33 and the appellant contributed 7-33 of the purchase price and that they were tenants in common as owners of said premises and that there was a mortgage indebtedness on same of $1900.00; that appellant should have the right by tendering to appellee 26-33 of the present value of said property, less the mortgage indebtedness, to have a deed executed by said complainant on or before July 1st, 1921, that if he did not exert this right, appellee then could, by offering to appellant 7-33 of the present value of said property less the said mortgage, demand a deed from him and in the event that neither the appellee or appellant exerted their right, the master in Chancery of the court was directed to sell same for cash, subject to said mortgage and divide the proceeds between appellee and appellant, according to said proportions. The decree allowed appellee $50.00 per month for seperate maintenance of herself and child.

An appeal was prayed and allowed on June 25th, 1921, upon the defendant's filing bond in the sum of $1,000.00 with surety to be approved by the clerk within thirty days from that date. The bond was filed and approved on July 20th, 1921, and there

after on the 25th day of July 1921, appellee applied to the court for writ of attachment against appellant to show cause why he should not be punished for contempt of court, in failing to execute the deed set forth in the decree upon the tender theretofore made by her of 7-33 of the present value of the home, less the mort-

gage. The writ was issued and thereupon the defendant appeared in court without process and complied with the order of the court under protest and executed the decd required by the decree.

It is contended by appellant that the evidence does not show that he was guilty of extreme and repeated cruelty and that therefore the decree is not supported by the evidence.

In order to sustain a decree for seperate maintenance, it is not necessary that the evidence should snow the existence of a statutory ground for divorce, but a wife who is not herself in fault is not bound to live and cohabit with her husband if his conduct is such as to directly endanger her life, person or health, nor where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward her, which will necessarily and inevitably render her life miserable and living as his wife unendurabe, and where these facts exist the wife has good cause for living seperate and apart from her husband and is not at fault, if she leaves her husband and refuses to live and cohabit with him. Johnson v. Johnson 125 Ill. 510; Brown vs. Brown 265 Ill. 546.

No good purpose would be served by discussing the evidence in detail. Appellee and her witnesses testified to a state of facts, which if true entitled her to seperate maintenance. While their testimony is contradicated by appellant, the chancellor saw and heard the witnesses and his finding having the same weight when appeal as the finding of a jury, we would not be justified, under the evidence in this case, in setting aside the finding.

It is contended by appellant that the decree was erroneous in allowing 26-33 of the net value of the real estate to appellee without first allowing to appellant a homestead exemption. It is doubtful under the evidence whether a resulting trust existed

and appellant had a homestead in the premises, but in any event appellant cannot complain of that portion of the decree fixing the property rights of the parties, as this portion of the decree was entered by consent and therefore not subject to review on appeal.

It is assigned as error that the court erred in ordering appellant to execute a deed of conveyance of the real estate in controversy in this case after an appeal had been perfected by him. The record does not show that he

was so ordered by the court after the filing of the appeal bond. Had such been the fact the action of the court in that regard could not be reviewed by us on this appeal as this is not an appeal from any order in that respect but is in an appeal from a decree which appeal was perfected before the issuance of writ of attachment.

The decree of the circuit court is affirmed.

(27510) Opinion filed July 10, 1922
Rehearing denied Oct. 4, 1922

Certiorari denied

General No. 7422 Agenda No. 61

October Term A. D. 1921

Jeanette B. Liska, Administratrix of the Estate of Harvey Liska, Deceased, Defendant in Error.

vs.

The Director General of Railroads Operating the Chicago & Alton Railroad as Agent for the President of the United States Under the Transportation Act of 1920, And the Chicago & Alton Railroad Company (A Corporation)

Plaintiffs in Error

227 I.A. 623

Error to McLean.

HEARD J.

This cause is founded upon the Federal Employers' Liability Act. The original declaration consists of four counts in case.

The first count charges that on August 1, 1919, the defendant was operating a certain railroad through the county of Logan, State of Illinois, and that plaintiff's intestate, Harvey Liska, was on said day in the service of the defendant as a brakeman upon one of its freight trains then engaged in Inter State commerce; that it was defendant's duty to provide and maintain for the use of plaintiff's intestate a reasonably safe place in which to perform his duties as brakeman, but the defendant made default in that regard in that it suffered to be and remain near the station of Griggs in said county and upon its premises a certain wire or wires then and there charged with strong and dangerous currents of electricity and running through a certain tile or culvert upon defendant's right of way, through which said culvert there flowed large quantities of water, and which said wires were so carelessly constructed, placed and maintained that the current therefrom passed into the water flowing through said culvert or tile, thereby so charging the water with electricity as to render same dangerous to the life of any person coming in contact therewith, which water then was and for a long time prior to that time had been used by the servants of the defendants to

supply water to the cabooses of its trains and to procure water for the cooling of hot boxes upon the wheels thereof;

which said use of said water was well known to the defendant; and that the defendant also knew, or by the exercise of reasonable care would have known, that said water was charged with electricity and that said wires were so carelessly constructed, placed and maintained, as aforesaid; that plaintiff's intestate while engaged in the scope of his employment as brakeman upon said train, in attempting to procure water from said brook or drain for use in the caboose of said train, and while in the exercise of due care and caution for his own safety became and was electrocuted. The other counts set up substantially the same cause of action.

Three additional counts were filed, the first of which was substantially the same in all respects as the first original count, except that it charges that the defendant suffered to be and remain upon its said premises at the place in question certain wire or wires charged with strong and dangerous currents of electricity and running through a certain concrete culvert across defendant's right of way, which wires were so carelessly constructed, placed and maintained that the current escaped therefrom, thereby rendering the said wires and objects adjacent thereto, dangerous to the life of any person coming in contact therewith. The other additional counts were substantially the same. To the declaration and additional counts Plaintiff in error who is hereinafter designated as defendant plead the general issue.

A jury trial was had and at the close of the evidence introduced by defendant in error, who is hereinafter called the plaintiff, and again at the close of all the evidence, motions were made to instruct the jury to find the defendant not guilty, which motions were overruled by the court. The jury returned a verdict for $10,000.00 in favor of plaintiff, upon which, after motion for new trial had been overruled, judgment was rendered, from which judgment this appeal has been taken.

The principal grounds of error relied upon by defendant are that

the court erred in not instructing the jury to find the defendant not guilty and that the verdict of the jury was contrary to the evidence in the case.

While liability cannot rest upon imagination, speculation or conjecture,—upon a choice between two views equally compatable with the evidence,—but must be

based upon facts established by the evidence fairly tending to prove them. (Wasson Coal Co. vs. Industrial Comm 296 Ill. 217) and before a recovery can be had a plaintiff must prove every element necessary to constitute the defendant's liability, such liability may be shown by the evidence of facts and circumstances together with the inferences and presumptions naturally arising therefrom.

Griggs station consists of a water tank, only, located upon the Chicago and Alton right-of-way, at a point about two and one half miles southwest of the city of Lincoln, Illinois. The Alton Company's right of way at that place is 100 feet in width. Its two main tracks, the westerly one being the south-bound and the other the north-bound, are laid upon a fill which, at the point of location of the concrete culvert mentioned in the declaration, about 300 feet south of the water tank, is about eight feet in height. The culvert is about three feet high by three feet in width and 35 or 40 feet in length. Through this culvert water flows in a westerly direction.

In 1910, or 1911, Jones, a farmer west of the right of way, employed electricians of Lincoln to construct for his exclusive use, an electrical transmission line which connected with the feeder wire of the Illinois Traction System whose tracks parallel the Chicago & Alton right-of-way on the east thereof. The Jones wire was connected with the traction system wire at a point about due east of the east end of the culvert in question. Commencing at its east end, the Jones line extended from a pole located at or near the westerly line of the Traction Sysem right-of-way through the culvert in question and

from there to the improvements upon the Jones premises, the entire length of the line being one-eigth of a mile. Mr. Jones obtained current from the Traction System to operate a 5 horse-power motor to grind feed and to pump water, and also for a one-half horse power motor used to run a washing machine. After this first line had been in for about three years, Jones, who was working near the west end of the culvert, received a shock while handling one of the wires of the right-of-way fence. He thereupon caused all of the wiring from the west side of the Traction System right-of-way and across and to the west side of the Alton company right-of-way to be removed, and employed an

electrician to procure new material for, and to construct, a new line. In constructing the renewed portion of the line a continuous piece of lead-covered insulated wire of cable was used. At its east end this lead-covered cable was fastened at or near the tip of a stub pole set about 20 feet to the west of the aforesaid pole located at the westerly line of the Tracion System right-of-way. An insulated wire, spliced to the end of the new cable, was strung between the two poles and proper connection made with the Traction System line.

Upon the aforesaid pole at the west side of the Interurban or Traction System right-of-way, were located a lightning arrester, a fuse plug and a meter, all constituting parts of the Jones power line. The fuse plug was located on the south side of said pole, at a point a short ditsance above the meter box, which was at the south side of the pole, while the lightning arrester and the box in which it was enclosed was located toward the top and at the north side of the pole. The course of the wiring of the Jones line, starting with the tap-feeder wire, was from that wire down the side of the pole and through the fuse plug, thence through the meter, thence up the opposite side of the pole, where it led off across the Chicago & Alton right-of-way. There was another short wire which connected the lightning arrester with the Jones load wire.

The function of the lightning arrester is to shut off or "take" charges of electricity, commonly called lightning, and to conduct same to the ground and thereby protect the main wire, apparatus

and equipment in connection therewith, from damage or destruction. In many instances, however, the lightning arrester is unable to carry the load and is itself destroyed and partly, or entirely, burned up. In such instances the fuse-plug is "blown" and not infrequently the meter is also damaged or destroyed and the wires leading thereto burned off, and occasionally the tap-feeder wire is also burned or fused in two. All of these conditions frequently result from lightning stroke, or strokes of high voltage.

At about midnight of July 31, 1919, an unusually severe electrical sotrm raged for an hour or more at and in the vicinity of Griggs station. There was much thunder and lightning, with considerable rain and some wind, the lightning having been especially severe and contin-

uous. There is evidence tending to show that on the following morning, August 1, at about 4 o'clock, Jones tried to start his motor in the usual way for the purpose of pumping water, but it wouldn't go; that up to the evening before the motor had been operating all right and all of the electrical equipment was in proper working order. There is evidence tending to show that a repair man arrived at Griggs between 9 and 9:30 o'clock in the forenoon,—which was from one hour and a half to two hours before the train upon which Harvey Liska was riding, as brakeman, arrived there; that he at once made an inspection and found the fuse-plug of the Jones line blown out and lying on the ground at the foot of the pole to which it had been attached; that he also found that the fuse wire had been fused or burned out for the space of about one inch, and that a small piece of the porcelian portion had been knocked off at the top end; that he did not replace the plug in its socket, or case, but left it there lying on the ground; that he also examined the meter and the meter-box located on the same pole, and found that both of the wires to the meter, one on either side, had been burned off in the neighborhood of three inches away from the meter itself; that both had the appearance of being melted; that he also then discovered that the meter was practically destroyed, in so far as operating or functioning was concerned; that there was also a good sized hole burned in one side of it and that it was smoked up by the burning; that he also observed that some of the lightning arrester had been

burned out and destroyed and that part of it was hanging down from the pole to which it was attached.

There was testimony from electrical experts that the blown-out fuse alone, or the burnt off wires leading to the meter alone, or the destruction of the lightning arrester alone, or the "putting out of commission" of the meter alone, would have made impossible the carrying of any current or voltage in any amount or degree to, by, or upon, the Jone line; that the instant any one of those things happened, the Jones line became absolutely "dead," and that an electrical "shock" from the Jones line, or any part of it, to any one who might come in contact therewith, was impossible.

The freight upon which Harvey Liska was riding, as rear brakeman, arrived at Griggs station about 11 o'clock A. M., on August 1st. When Liska's train arriv-

ed at Griggs, it stopped and he got out of the caboose. When last seen alive Liska was walking along the east side of the train, three or four car lengths ahead of the caboose. The train remained at Griggs, for fifteen or The crew were having trouble with some hot boxes, and at Ridgely Liska hung his galvanized iron bucket upon the east side of the train, eight or ten cars from the caboose. The train remained at Griggs for fiftten or twenty minutes. It then proceeded upon its trip to Bloomington, which was the end of the run for Liska's crew. After passing through Lincoln, the conductor discovered that Liska was missing, and searched the train for him.

The search disclosed that Liska was not on the train which fact was reported by the conductor upon the train's arrival at Bloomington at 2:15 o'clock in the afternoon. Thereupon a wire was sent to the crew of a south bound train, then at Lincoln, ordering them to look for a missing brakeman at and in the vicinity of Griggs. The members of this crew upon arrival at Griggs engaged in a search which lasted about 40 minutes, when Liska's dead body was found lying in a pool of water at the west end of the culvert in question, with his head "right in the mouth of the culvert." Liska's right leg and arm were flexed somewhat and his face and body were under the water, part of the right arm extending above its surface. Liska's empty bucket, at the time his body was found, was standing upright on the

south side of the stream, about a foot and a half from the edge of the pool, and several feet west of the end of the wings which extended westwardly from the culvert proper. His body was placed upon the train, and taken to Lincoln where a postmorten examination of his body was made and his vital organs examined which examination developed that death was not caused by drowning. The medical experts testifying for plaintiff gave it as their opinion that the conditions found were such as would indicate death of electrical shock. Medical experts called by defendant gave it as their opinion that the conditions found in Liska's heart and coronary artery were sufficient to cause instantaneous death, while plaintiff's experts testified that the condition of the heart and artery were not sufficient to cause sudden death.

When found Liska was lying upon his left side and

his right arm. His right knee and elbow were out of the water and flexed. The right side of the heart was dilated and filled with blood, while the left side was nearly empty and the evidence tends to show that these conditions indicate death as the result of an electric shock.

The evidence tends to show that a person going to the place where Liska's body was found, for water would necessarily have to step over the wire, carrying normally 650 volts of electricty and the pipe in which it was. There is evidence tending to show that on August 1 the water had been up as high as the pipe; there is likewise evidence tending to show that any leakage on the line would be increased by having the apparatus wet or damp and that if there was sufficient water about it the line would be so robbed of its power that the machinery could not be operated; that if the wire came in contact with the water it would not blow out the fuse, but that if a man reached into the pool with a galvanized iron bucket and got a shock sufficient to knock him over and in so doing he came in contact with the iron pipe it would blow out the fuse; that if there was an abrasion of the insulation of the wire going through the culvert and there was a leakage and he put his hand in the water he would receive a shock.

One of the witnesses for plaintiff who examined the place in question on the following day testified that he observed a wire which came

out from underneath the culvert; it was fastened to the culvert by insulators and came into the pipe on the outside of the culvert some six or eight inches (other witnesses put this distance a little farther); the insulation was very bad on the wire, ragged and torn and part of it gone; that it looked ragged when it goes into the pipe right next to west end of culvert; that it goes under the culvert and comes out and is coiled around before it goes into an iron pipe. Witnesses called by defendant testified that the wiring and insulation was in good condition. There was a quantity of weeds and high grass about the pipe and the place where Liska's body was found.

While none of the men who assisted in taking Liska's body out of the water received a shock one of plaintiffs witnesses testified that other brakemen were in the habit of getting water at the place in question and that

about two weeks prior to Liska's death he went down to get a bucket of water and there was a dog lying dead at the edge of the pool; that he reached over to put the bucket in the water and it was knocked out of his hand and he was knocked backwards; that when he put his hand on the bank as he was stepping down he felt something tingling in his hand; that he had just touched the bucket to the water when it was knocked out of his hand.

There is evidence tending to show that prior to his death Liska seemed to be healthy and never sick; that he was always a strong and steady worker and lost no time on account of illness. He had been working for the C. & A. R. R. Co., twelve years and had been married fourteen years and his wife testified that she did not remember of his having had a physician during that time.

The evidence in the record was very voluminous and we have not attempted to set out all the material points of the evidence in full, but only sufficient to show that there was some evidence fairly tending to prove all the material allegations of plaintiff's declaration and that the Court did not err in refusing to instruct the jury the defendant not guilty.

Page 8

While the evidence in the case is conflicting and there is a sharp conflict between the direct testimony of some of the witnesses and some of the proven circumstances in evidence we cannot say that the verdict of the jury is manifestly against the weight of the evidence.

~~The judgment is affirmed.~~

~~Page 9~~

It is contended by appellant that the court erred in the admission and exclusion of certain testimony and in the denial of defendants offer to make certain proof. We find no reversible error in this respect.

The evidence does not show any lia bility on the part of the Chicago & Alton Railroad Company. It is apparant from the record that at the time the cause of action originated, the Chicago & Alton Railroad was exclusively operated and controlled by the other defendant in the suit, the Director General of Railroads. The judgment so far as it concerns the Chicago & Alton Railroad is therefore reversed. M. P. R. R. Co. vs. Ault. 256 U.S. 554. The judgment is affirmed as to the Director General of Railroads.

Page 9.

Opinion filed July 10, 1922
Rehearing denied Oct 4, 1922

General No. 7426 Agenda No. 5

April Term, A. D. 1922

Charles Farris, Plaintiff in Error,

vs.

227 I.A. 604

Wabash Railway Company, Defendant in Error.

Error to Macon County

HEARD, J.

This was an action brought by Charles Farris, plaintiff below and plaintiff in error here against the Wabash Railway Company for damages for personal injuries alleged to have been sustained by him as the result of an alleged accident while he was acting as brakeman on a Wabash freight train engaged in interstate commerce. The case was based upon the Federal Employer's Liability Act. A trial resulted in a judgment for defendant for costs and in bar of the action and the case is now before this court upon writ of error.

The claim of the plaintiff was that while acting as brakeman on interstate freight train of the defendant proceeding from Decatur, Illinois, to Peru, Indiana, on or about July 27, 1917, the plaintiff, while in the night time mounting and ascending one of the cars of said train, in the course of his duties, and exercising care for his own safety, was struck on the head by a standpipe, at or near Sidney, Illinois, which the defendant negligently suffered and permitted to be and remain in too close proximity to the tracks. and that as a result thereof he was injured and partcularly became afflicted and still is afflicted with epilepsy. The defenses raised by appropriate pleas were that the plaintiff never met with the alleged accident at all; that defendant was not guilty of negligence, and the defenses of contributory negligence, and assumed risk.

The court gave to the jury a number of instructions on the subject of the doctrine of assumed risk, one of which is as follows:

"The Court instructs the jury that the occupation of railroad brakeman is necessarily fraught with some danger to the employe, and that a brakeman of mature years is taken to assume the risk of such dangers and accidents as are normally and necessarily incident to such occupation, whether he is actually aware of them or not, and that

he cannot in law recover damages for injuries arising out of and because of such ordinary and normal dan-

gers and risks incident to such occupation. The jury are further instructed that while such employe does not ordinarily assume the risks of other accidents and dangers that are not incident to such occupation, yet if such risks and dangers are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them, then as to such, the employe is held to have assumed the risks thereof, and cannot recover damaages for injuries resulting theremrom."

It is contended that the giving of this and other similar instructions was error.

In Gila Valley Railroad Company vs. Hall 232 U. S. 94, it was said:

"The employe has a right to assume that the employer has exercised proper care with respect to providing a safe place to work and suitable and safe appliances to do the work, and is not to be treated as assuming the risk arising from a defect that is attribuatable to the employer's negligence until the employe becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employe with assumption of risk attributable to a defect due to the employer's negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."

In Chespeake Railway Company v. Proffit 241, U. S. 462, it was said: "The employe is not obliged to exercise care to discover dangers not ordinarily incident to the employment but which result from the employers negligence."

In Wilson v. B. & O. Railroad Company 194 Ill. App. 491, a case where a conductor was injured, the negligence alleged and proven consisted in the faulty construction of the main line and the siding with reference to the distance between them. A judgment for $45,000, which at that time was the largest personal injury judgment ever

rendered in this State, was affirmed and certiorari denied by both the Supreme Courts of the State of Illinios and of the United States.

In U. S. R. S. Company vs. Wilder, 116 Ill. 100, the rule is laid down that a servant in entering upon an employment assumes generally only such risks as he has no-

tice of either express or implied and that where there are special risks of which the servant is not, from the nature of the employment cognizant, or which are not patent, it is the duty of the employer to noify him of them and on failure so to do, if the servant is injured by exposure to such risk, he is entitled to recover.

In Devine vs. Delano, 272 Ill. 166, it was said:

This court has held that a railroad company is guilty of actionable negligence to its employes in operating a train, either upon its own track or upon a track belonging to another railway company, past an obstruction located dangerously near to the track, provided the operating company knows, or by the exercise of ordinary care could have known, of such dangerous obstruction."

To the same effect is Illinois Central Railroad Company vs. Welsh, 52 Ill. 183.

For the error in giving these instructions in this case the judgment is reversed and the cause remanded.

(21532) Opinion filed July 10-1922

General No. 7430 Agenda No. 8

April Term, A. D. 1922

Frank J. Liesman, Plaintiff in Error,

vs.

J. Q. Primm, Justice of the Peace, and Less Williamson, Defendants in Error.

Error to Logan.

227 I.A. 205

HEARD, J.

Plaintiff in error, hereinafter called petitioner, filed a petition for mandmus in the circuit court of Logan county alleging that on August 28, 1920, he recovered a judgment for $92.50 damages and costs, against defendant in error, Williamson, hereinafter called defendant, in Justice court before defendant in error, Primm, hereinafter called justice of the peace; that on Sept. 16, 1920, defendant filed with said justice of the peace an appeal bond, in the usual form, which bond was endorsed by said justice of the peace as follows: "Taken and approved by me at my office, this 16th day of Sept. A. D. 1920;" that defendant did not pay to the justice of the peace nor to the clerk of the circuit court the appeal fee of five dollars, that the docket of the Justice of thePeace shows an entry "Oct. 9th, 1920. Transcript and all papers sent to circuit clerk this day;" that on March 31, 1921, and on June 13, 1921, he filed praecipes for an execution on said judgment with said Justice of the Peace and that said Justice of the Peace refused to issue execution on said judgment. The petitioner prayed for a writ of mandamus commanding the justice of the peace forthwith to issue an execution on said judgment.

The petition for mandamus in this case was filed upon the theory as stated in plaintiff's argument that the failure of the defnedant, within twenty days from the rendition of the judgment in said justice court, to pay to said Justice of the Peace the fee provided by law for the filinf of such appeal was and is a failure on his part to perfect his appeal and that in law and in fact the said Less Williamson has never taken any appeal from the judgment aforesaid rendered by said Justice of the Peace against the said Less Williamson and in favor of the petitioner, Frank Liesman for the sum of $92.50 and costs of suit, and that because of such failure to perfect his appeal petitioner is entitled to have execution of his judgment and that it is the duty of the Justice of the Peace

under the law to issue an execution upon said judgment.

The circuit court sustained a general demurrer filed by the defendants in error to the petition for mandamus and dismissed the petition for mandamus and entered judgment against petitioner for costs.

Page 1

While by Sec. 116 Chap. 79 Smiths Stat. 1921, the payment of the fee for filing the appeal within twenty days from the rendition of the judgment is one of the requirements for perfecting an appeal, it may be waived by the appellee and he may, if the cause is docketed, and no motion entered in the circuit court to dismisss the appeal, enter his appearance in the circuit court and the case then tried upon its merits and for anything which appears int he petition for mandamus that may have been what happened in this case.

The petition shows that the bond and all papers were transmitted to the circuit clerk and as long as the appeal is not disposed of in some manner by the circuit court mandamus will not lie to compel the justice of the peace to issue an execution on the judgment.

The judgment s affirmed.

Page 2

Opinion filed 11, 1922
Rehearing denied 1922

General No. 7436 Agenda No. 14

April Term, A. D. 1922

The People of the State of Illinois, Defendant in Error,

vs.

Arl Young, Plaintiff in Error.

Writ of Error from Ford.

HEARD, J.

Plaintiff in error was indicted by a grand jury of Ford county for an illegal sale of intoxicating liquor. The indictment was certified to the county court for trial and upon a trial by jury he was convicted and by the court sentenced to be confined in the county jail for thirty days and to pay a fine of $400 and costs and ordered to stand committed to the county jail until the fine and costs were paid. To review this judgment of conviction plaintiff in error has sued out a writ of error from this court.

It is first contended that the court erred in denying plaintiff in errors motion for a continuance. The case was set for trial on Monday, Feb. 20, 1922. At 10:30 on this day plaintiff in error made an oral motion for a continuance and was given until 11 A. M., to file a written motion for a continuance. At 11 A. M. he did not appear and his recognizance was forfeited. At 11:55 he made a written motion to set aside the default and for a continuance, supported by his affidavit which stated in substance that on Sunday morning about eight o'clock, his attorney, C. E. Beach, who prepared the case, called him on the telephone and told him that his wife was at the point of death, that he had to take her to a hospital and that he could not try the case the following day; that he called the State's Attorney and told him the circumstances and understood that he would be granted a continuance, but would have to come over and make a showing; that he asked the State's Attorney to notify witnesses not to come to spare expenses; that lawyers' offices were closed on Sundays and that he could not consult a lawyer until Monday, the day of the trial, when he employed E. J. Pacey; that the said E. J. Pacey knew nothing about the case, that he had not been employed in it before, and that he had had no opportunity to investigate the facts; that he had a meritorous defense in this case and if forced to trial would be deprived of his right of impartial trial before a jury; that his attorney, the said C. E. Beach, had in his possession all the papers relative to

this case, and that affiant had not had an opportunity to get the same and deliver them to the said E. J. Paccy, that the said C. E. Beach had in his possession a signed statement made by Charles Ryan, which

statement sets up that the said Charles Ryan had not been in the house of Arl Young for twenty-three months prior to the bringing of said indictment; that the said Ryan was the principal witness for the state; and that it is upon his testimony that the prosecution relied, and said statement further states that he never at any time bought any liquor from the said Arl Young. The court denied the motion for a continuance and the cause was tried upon that day with the result above stated. It is contended that the court erred in refusing to grant a continuance. Where the motion for continuance is not based upon a statutory ground, but upon other grounds where it appears clearly from the evidence that injury is likely to result from a refusal of it, a trial court, in the exercise of sound discretion, will grant it, but being a matter within the discretion of the court, unless the court of review can see that there was an abuse of that discretion, a judgment otherwise fair upon its face will not be reversed. City of Elgin v. Nofs, 212 Ill. 20.

Sufficient time, however should be allowed to prepare a motion for a continuance and a continuance should be granted to prevent any person of crime from being forced to trial without a reasonable opportunity to employ counsel and properly prepare for trial. Bell vs. Tolucax Coal Co. 272 Ill. 576; People vs. Singer, 288 Ill. 113. As this case must be reversed on other grounds and this question is not likely to again arise in this case we do not deem it necessary to decide whether there was an abuse of discretion in refusing the continuance.

A witness Charles Ryan testified that he purchased a pint of liquor containing fifty per cent alcohol from Defendant in Error on Dec. 1st, 1920, at his home in Gibson City and paid $12.50 therefor. Defendant in Error denied having sold Ryan any liquor and denied that Ryan was at his house on or about Dec. 1, 1920. A statement signed by Ryan in which he stated that he never at any time bought any intoxicating liquor of Defendant in Error and that he had not been at his house within 23 months prior to July 1921 was introduced in evidence which tended to impeach Ryan's tesitmony. Ryan and

defendant in error were the only persons testifying upon the question of the sale of liquor.

For the purpose of impeaching defendant in error the State's Attorney called four witnesses who were interrogated upon the question of

defendant in errors reputation for truth and veracity. Much of the evidence was incompetent and should have been stricken out when its incompetency became manifest. People vs. Willy, 301 Ill. 307.

At the request of the people the court gave the jury the following instruction: "The court instructs you that the testimony of a single witness is sufficient for a conviction of the offense charged in this case provided you are saitsfied beyond a reasonable doubt of the truth of the testimony of such witness." This instruction was erroneous. To warrant a conviction it is not sufficient that the jury be satisfied beyond a reasonable doubt of the truth of the testimony of a witness, but they must be satisfied of the guilt of the defendant of the crime with which he is charged in the indictment beyond a reasonable doubt. In the present case four witnesses testified as to the defendants reputation. The jury might have been satisfied beyond a reasonable doubt of the testimony of one of these witnesses and yet have had a reasonable doubt of the defendant's guilt from the evidence.

The court also gave the jury the following instruction: "The court instructs you that if you find from all the evidence and circumstances in this case that Arl Young did sell intoxicating liquor within Prohibition Territory as charged in the indictment without at the time having secured from the Attorney General of this state a permit to sell intoxicating liquor within Prohibition Territory, then Arl oYung was guilty of a misdemeanor and it is your duty to find him guilty." This instruction entirely ignores the rule of law that before a defendant can be found guilty of a criminal offense, the jury must find him guilty from the evidence beyond "all reasonable doubt."

The judgment is reversed and the cause remanded.

Opinion filed July 10, 1922

General No. 7437 Agenda No. 15

April Term, A. D. 1922

Jessie Davis, Appellee,

vs.

Lester Davis, Appellant.

Appeal from Fulton.

227 I.A. 621

HEARD, J.

In this case the Circuit Court of Fulton County after a hearing upon a petition for temporary alimony, solicitor's fees and suit money, in a suit brought by Appellee against Appellant for seperate maintenance, found that the sum of seventy-five dollars per month would be a reasonable and proper allowance for temporary alimony for the support of appellee and her two children during the pendency of this proceeding and the sum of one hundred dollars would be a reasonable and proper fee to be allowed to complainant for her solicitors as a retainer, and to enable her to prepare her cause for trial and entered an order requiring appellant to pay to appellee seventy-five dollars per month until the further order of the court and the further sum of one hundred dollars as solicitor's fees for complainant's solicitors, from which order this appeal is taken.

Upon the hearing of the petition it was shown that appellee and appellant were united in marriage Feb. 15, 1905; that two children, Mary, aged 14 and Martha, aged 11, were born as the issue of such marriage; that appellee and appellant lived and cohabited as husband and wife from such marriage until the early part of 1917; that on April 17, 1917, appellee and appellant entered into a contract whereby appellee consented and agreed to live separate and apart from appellant during the remainder of her life and at no time thereafter to maintain or begin any proceeding whatsoever to require or attempt to require appellant to provide for the support of herself or the support, care, education of said children.

It is contended by appellant that this contract is a bar to the allowance of alimony in the suit. The evidence showed that after entering into the contract the parties again resumed the marital relation in October, 1917, and continued to live together as husband and wife untl the spring of 1919.

By the resumption of the marital relation the con-

tract of April 17, 1917, so far as it related to the support of appellee and said children was abrogated and it is not a bar to the allowance of alimony in the present suit. Panther Creek Mines vs. Ind. Com. 296 Ill. 565.

The evidence upon the hearing showed that in February 19, 1919, the parties again seperated and entered into a written agreement dated February 25, 1919, which among other things contained the following recital:

"It is fully agreed and understood by and between the parties hereto, that the act of seperation between the parties is wholly the act of the said Jessie Davis, that she, the said Jessie Davis, is leaving and seperating herself from her said husband, and that the same is done aaginst the wish and desire of him, the said Lester Davis." Appellant's affidavit read upon the hearing states that appellee was living seperate and apart from him against his wishes and that he had been at all times ready to furnish the two daughters with a suitable home.

Appellant contends that as shown by the contract the act of seperation being wholly the act of appellee, she is not living seperate and apart from her husband without fault on her part and that for that reason she cannot maintain an action for seperate maintenance.

Appellee's affidavit read upon the hearing states that during the time appellee lived with appellant she discharged her duties as a wife and conducted herself properly. That he commencing in 1907, on numerous occasions was guilty of cruelty an inhuman treatment towards her and frequently struck, choked, bruised and otherwise ill-treated her when she would remonstrate and protest concerning his association with other women; that he shortly after said marriage committed adultery and particularly in the year 1909, committed adultery with certain lewd women in Peoria, as a result of which he contracted a veneral disease which he communicated to complainant; that in April, 1918, he committed adultery with one Eliza Totten and on numerous occasions prior and since said date has committed adultery with said Eliza Totten; that Eliza Totten is a woman of bad reputation and during the past three years appellant has frequently been in her company and called at her home;

that appellee remonstrated with him concerning his conduct with said Eliza Totten and tried to get him to desist from his adulterous relations with her, but he refused to do so and

continued to neglect his family and associate with the said Eliza Totten until his conduct became such that appellee was compelled to seperate from him on March 1, 1919, and since said time has lived seperate and apart from him.

When a husband has pursued a persistent, unjustifable and wrongful course of conduct toward his wife, which will necessarily render her life miserable, and living as his wife unendurable, she is not bound to live with him as her husband, and living seperate and apart from him under such circumstances is without her fault within the meaning of the statute. Johnson vs. Johnson 125 Ill. 510; French vs. French 302 Ill. 152. We are of the opinion that this objection to the order is not well taken.

In the contract of February 25, 1919, it was provided that appellant should pay to appellee the sum of $10 weekly for the support of the children and it also provided as follows:

"And the said Jessie Davis, in consideration of the payment to her of the monies above mentioned and set forth in the amounts and at the times and place as above set forth for the support and maintenance of the said children and in consideration of the other agreements above set forth to be performed by the said Lester Davis, agrees and contracts to and with the said Lester Davis that she will not in any manner disturb, annoy or interfere with him during the time that they live seperate and apart, and that she will not commence any action in court against him either for the support and maintenance of herself or their said children during the time this contract is in force and effect and while the said Lester Davis is complying with the same, and that she will take good care of said children and support and maintain them in proper manner so far as her financial ability will permit with the assistance to be had from the payments to be made to her by the said Lester Davis as above set forth.

It is now mutually agreed and contracted by and between the

parties, that the weekly payments to be made as aforesaid by the said Lester Davis to the said Jessie Davis, for the support and maintenance of the said chlldren is to continue for a period of two years from the date of this contract unless the same is in some manner mutually changed by the consent of each of said

parties in writing, and that at the end of the said two years, this contract may be renewed either on the same terms, if agreeable to both parties, or on such other terms, if any further terms are then agreed on by the parties, as said parties may mutually at that time, agree upon, and that if this contract is not then renewed, or if no other contract is made by and between the parties, then either party at that time is at liberty to take such action in the premises as he or she desires to take."

It is contended by appellant that these provisions of the contract are a bar to this suit. This contract was not renewed at the expiration of the two years and appellee was then at liberty to take such action in the premises as she saw fit and appellant failing to contribute to her support and that of the chidren she was at liberty to commence this suit. French vs. French, supra.

Appellant has made twenty two assignments of error. We do not consider it necessary to consider the remainder of these assignments in detail. It is sufficient to say that we are of the opinion that the case as shown by the record is one which fully warranted the court in ordering the payment of the $75 per month.

Orders of court fixing solicitor's fees must be based upon evidence and the evidence must be preserved by ceritficate of evidence. In the present case while the evidence, preserved in the certificate of Evidence, shows that it was a proper case for the allowance of solicitor's fees and suit money there is no evidence in the record year which to base the allowance of as pecific amount and that part of the order which provides for allowance of solicitor's fees must therefore be reversed.

That portion of the order providing for the payment by appellant to appellee of the sum of $75 per month until the further

Page 4

order of the court is affirmed and the order is reversed and remanded as to that portion of it providing for the payment of $100 solicitor's fees.

Page 5

Opinion filed July 10-1922
Petition for rehearing denied Oct 4, 1922

General No. 7481 Agenda No. 48

April Term, A. D. 1922

Jessie Davis, Appellee,

vs.

Lester Davis, Appellant.

Appeal from Fulton.

HEARD, J.

Appellee filed to the May Term, 1921, of the Circuit Court of Fulton County, a suit for seperate maintenance against appellant, alleging that she was living seperate and apart from him with two children born as the issue of said marriage without any fault on her part and because of the cruel and inhuman treatment and adulterous practices of appellant.

It appears from the record in this case that at the September Term, 1921, of the Circuit Court, the court made its order requiring appellant to pay appellee seventy five dollars per month until the further order of the court and the further sum of one hundred dollars as solicitors' fees for complainant's solicitors. An appeal was perfected by appellant from the order made at the September term an opinion in which case was filed at the present term of this court and is No. 7437.

After the filing of the appeal bond and perfecting said appeal appellee filed her petition in the Circuit Court on the 15th day of December, 1921, asking for alimony for herself and two children, pending said appeal, and for solicitor's fees and suit money to enable her to follow said appeal.

The court, after considering the evidence offered, entered its order requiring appellant to pay appellee fifty dollars ($50) per month, pending the appeal from the first order, or until the further order of the court, and the further sum of fifty dollars ($50) for solicitor's fees for services to be rendered in connection with said appeal and the additional sum of twenty-five ($25) for suit money and expense money on said appeal.

Eighteen assignments of error are made nearly all of which are the same as the assignments in Davis vs. Davis, supra, and what we then held disposes of these questions here.

By the order in question on this appeal the $50 per month was allowed "pending said appeal so taken from

the order of this court or until the further order of this court, and it is contended by appellant that as the statute only provides for an allowance during the pendency of the appeal that the order as written provides for the payment of fifty dollars per month for a period greater than is provided for in the statute, and is improper, in valid and that lower court was without authority to make the same.

While the court was only authorized to make an allowance during the pendency of the appeal, we are of the opinion that the only proper construction of this provision of the decree is that the payments should be made during the pendency of the appeal unless the court should before the termination of the appeal proceedings made some other order.

The record differs from that in Davis vs. Davis, supra, in that in the present case the affidavit of appellee read in evidence shows that to follow the appeal and defend her interest would require the expenditure of at least $75 and the court will take judicial notice of the amount of the fees of this court which appellee must pay.

We are of the opinion that the order of the Circuit Court was fully sustanied by the evidence and it is affirmed.

Opinion filed July 10, 1922

General No. 7439 Agenda No. 17

April Term, A. D. 1922

M. H. Solliday, Appellee,

vs.

Peabody Coal Co., Appellant.

Appeal from Christian.

HEARD, J.

This is an action on the case brought by appellee against appellant for damages alleged to have been sustained by the subsidence of a portion of appellee's land in Christian County based upon the claim that appellant wrongfully, negligently and carelessly mined the coal from under the surface of said premises without leaving adequate support and failed to supply suitable and adequate artifical props to prevent the ground from sinking and that as a consequence of appellant's negligence great portions of the plaintiff land sank and that portions of the land by reason thereof have been rendered wholly unfit for agricultural purposes and other portions of said land rendered unfit for agricultural purposes unless at great expense for additional drainage. A trial of the cause resulted in a judgment in favor of appellee against appellant for $3,700 damages and costs, from which judgment an appeal has been taken to this court.

It is claimed that there is a veriance between the declaration and the proof as to the date of the alleged subsidence. This variance was not pointed out to the court upon the trial and the point cannot be now considered here.

Complaint is made that the court allowed appellee to introduce evidence upon two different theories as to the measure of damages.Appellee introduced the evidence of a surveyor as to the necessity of draining the subsided land and as to the cost of installing such drainage and thereafter when appellee sought to introduce evidence as to the difference in the market value of the land before and after the subsidence counsel for appellant objected to this evidence as to difference in market value and moved to strike it out on the ground that appellee could not take both theories. Whereupon it was stated by counsel for appellee "The claim for damages here is based upon the depreciation to the market value of the land. The fact it needs to be drained is an incident which may enter into that." The court properly refused to

strike out the evidence as to depreciation in market value.

Complaint is made of the admission of a plat in evidence as it was not made entirely from surveys made by the witness. As the plat and the estimate of the cost of drainage which is also complained of are not abstracted we are unable to see from the abstract that appellant could be in any way prejudiced by their admission in evidence. Courts of review will not

go beyond the abstract to search for error upon which to reverse a case while they will examine the record for the purpose of sustaining the action of the trial court.

It is claimed by appellant that the damages are excessive. The damages allowed are clearly within the range of the testimony and we should not be justified in interfering with the finding of the jury in that regard.

Criticism is made of appellee's first given instruction because it used the word "suffered" instead of the word "sustained" with reference to the damages. As these words are synonyms we fail to find the error in such use. Criticism is made of other of appellee's instructions. While we think that the meaning of some of them might have been more clearly expressed we do not consider them erroneous.

We are of the opinion that the jury were fairly instructed and that no reversible error has been shown.

The judgment is affirmed.

(2758)

Opinion filed July 10-1922

General No. 7442 Agenda No. 20

April Term, A. D. 1922

D. R. Noonan, Appellee,

vs.

Emerson-Brantingham Implement Company, a Corporation, Appellant.

HEARD, J.

Appellee recovered a judgment against appellant for $1391 damages in the circuit court of Edgar County in a suit in assumpsit in which the declaration consisted of the consolidated common counts, from which judgment an appeal has been taken to this court.

Appellee filed a bill of particulars which is as follows:

"Emmerson-Brantingham Company

To D. R. Noonan, Dr.

To 1 E. B. 12-20 Tractor $1395.00"

The facts in evidence pertinent to the issues as stated in appellees brief and argument are that: In the summer of 1918, D. R. Noonan, who was then an automobile dealer in the City of Paris, County of Edgar, and State of Illinois, was approached by agents of the company and asked to take the agency for a farm tractor which the appellant company was manufacturing and selling. After some discussion with the agents of the appellant company, the appellee took the agency for said farm tractor with a definite agreement that he would not be required to carry any tractor over the winter, providing that he decided not handle tractors for the year 1919. This agreement was made with the appellee by one B. W. Hollenbeck, who was manager of the appellant company's branch at Peoria, Illinois.

After the agreemnt was entered into the appellee proceeded to sell tractors and before the tractors were sent to him from the appellant company and before they were received by him, the tractors were shipped and a draft with a bill of lading attached was sent to the bank which the appellee was required to pay before he could secure the tractor from the railroad company.

Three tractors in all were shipped to the appellee, two of which he sold but all of which he paid for to the appellant company.

On the 19th of December, 1918, the appellee advised the appellant by letter that he had decided not to handle

tractors in 1919, and that he had one tractor on hand an as his agreement was that he would not be required to carry this over the winter, he asked appellant what disposition

Page 1

he should make of the tractor.

On December 20th, he recived a letter from the appellant company acknowledging receipt of his letter of the 19th and stating that the appellant company would have said tractor loaded and taken off his hands, but instead of carrying out that promise and the promise made to him at the time he took the agency for said tractor, the tractor remained in the store house of the appellee and was still there at the time of bringing this suit."

One of the points urged by appellant is that the evidence introduced upon the trial of said cause was at variance with and did not support the declaration of cause of action arises out of a contract which has been in part ticulars filed in support thereof.

The tractors were shipped upon a written order which no one seemed to consider of sufficient importance to introduce in evidence. If the contract was as stated by appellee then it was a special contract for a sale and for a resale contingent upon the happening or not happening of certain events.

The law in this state is well settled that a recovery cannot be had on the common counts where the cause of acton arises out of a contract whichh as been in part performed from which the plaintiff has derived some benefit and where as in the present case by recovering a verdict the parties cannot be placed in the exact situation in which they originally were when the contract was made. Rusell vs. Gilmore, 54 Ill. 147; Phoenix Mutual Life Ins. Co. vs. Baker, 85 Ill. 410; Fish vs. Farwell, 160 Ill. 236; Heffron vs. Rochester Ins. Co. 220 Ill. 514.

The judgment of the circuit court is reversed and the cause remanded.

Page 2

(2751)

Opinion filed July 10, 1922

General No. 7444 Agenda No. 21

April Term A. D. 1922

Edward H. Trabue, Appellant,

vs.

Robert L. Bowman, Appellee.

Appeal from Greene.

227 I.A. 622

HEARD, J.

Appellant filed his bill in chancery in the Circuit Court of Greene County against appellee, asking for the specific performance of a contract of sale of real estate and thereafter by leave of court, said bill was amended. A demurrer was sustained to the amended bill and appellant electing to stand by his bill, the court entered a decree dismissing the bill as amended and ordered appellant to pay the costs of the proceeding from which decree appellant has appealed to this court.

The bill as amended alleged in substance that appellant and appellee on the 20th day of May, 1920 entered into a verbal agreement and sale of certain lands of which appellant was owner and afterwards signed a memorandum of agreement in writing respecting the said sale and purchase in the words following to-wit:

"THIS INDENTURE, Made this 20th day of May, A. D. 1920, between Edward H. Trabue party of the first part, and Robert L. Bowman party of the second part.

WITNESSETH, That the party of the first part has this day sold to the party of the second part, the following described property to-wit: The N. ½ and the S. W. 1-4 of S. W. 1-4 and S. ½ of S. 1-4 of N. W. 1-4 of Section 31, Town 11, N. Range 10, West in Greene County, Ill. together with all appurtenances, thereto belonging and now thereon, for which the party of the second part agrees to pay the sum of Sixty-four Thousand and 00-100 Dollars, ($64,000.00) payable as follows: Cash in Hand Thirteen Hundred and 00-100 Dollars, receipt whereof is hereby acknowledged, Balance note for Four Thousand Dollars, payable March 1st, 1921, the receipt whereof is hereby acknowledged and the balance March 1st, 1921, ($58,700.00): The above mentioned note to be without interest until maturity.

The party of the first part is to furnish to the party of the second part, or assigns, a warranty deed and a good and sufficient abstract of title, showing a good title of record to the premises hereinafter described in the party

of the first part, on or before March

Page 1

1st, 1921, assign all insurance on said buildings, pay all taxes and assessments against said real estate, and if there is a mortgage on said property, pay interest and taxes thereon up to March 1st, 1921, and give possession by March 1st, 1921.

It is mutually agreed that time is an essential element in this contract and it is further agreed that in case either of the parties hereto fail to perform the stipulations of this contract, or any part of the same, the failing party shall pay to the other party of this contract the sum of Fifty-three Hundred Dollars ($5300.00) as damages for non-fulfillment of contract.

IN TESTIMONY WHEREOF, the parties of aforesaid have subscribed their names the date above mentioned.

Robert L. Bowman, 2nd Party,
Edward H. Trabue, 1st Party."

The bill further alleges that the defendant paid the complainant Thirteen Hundred Dollars in cash and delivered to him his promissory note in the sum of four Thousand Dollars, due March 1st, 1921, without interest until maturity, both as a part of the purchase price for said lands; that the defendant afterwards paid the note before the maturity thereof and accepted a surrender thereof by the complainant; that since the execution of said agreement the said defendant entered into the possession of and plowed a part of said real estate; that he purchased wire to construct a fence on the said real estate described in said contract.

The said bill further alleges that on and prior to March 1st, 1921, complainant had been ready and willing and was able to perform his part of said agreement; that on the 16th day of February, 1921, and again on the 1st day of March, 1921 complainant offered and tendered to said defendant an abstract of title to said real estate, showing a good title of record to said real estate in said complainant; that the defendant refused to accept, receive or examine said abstract, stating in each of said occasions that he knew the title to said real

Page 2

estate was good and thereby relieved complainant from furnishing said abstract; that on and prior to said first day of March, 1921, the defendant declared to the complanant his in-

tention not to perform his part of said agreement; that on the 16th day of February, 1921, said defendant said to complainant that he would not take the farm on account of the condition of things, and on March 1st, 1921 the defendant said to complainant that he was not going to take the place as the bottom had fallen out of prices; that by the defendant declaring his intention not to perform his part of said agreement he thereby waived the tender to him of said abstract, deed and the assignment to him of said insurance, and the delivery of possession of said real estate to him; that prior to March 1st, 1921, complainant and his wife executed and properly acknowledged a warranty deed for all of said real estate conveying said real estate in fee to the said Robert L. Bowman and on the 1st day of March, 1921, he offered to deliver said deed to said defendant and demanded from said defendant the payment of the rest of the money due on said contract; that said defendant then stated to said complainant that he was not going to take the place because the bottom had dropped out of prices and refused to accept said deed and pay $58,700.00, the balance of said purchase price and perform his part of said agreement.

The bill further alleges that there was no incumbrances upon said real estate, that all taxes and assessments which were due, or that would become alien on said real estate up to the first day of March, 1921, had been paid by said complainant; that said complainant was ready and willing to deliver possession of all of said real estate to said defendant and was ready, able and willing an offered to carry out his part of said agreement and to execute a proper conveyance of said real estate to said defendant and to furnish and deliver to him a good and sufficient abstract of title showing a good title of record to said real estate in said complainant and to assign all insurance on the buildings on said real estate; that the said defendant alleged and alleges that he is not bound in law or equity to carry out his part of said agreement, and does not deny or claim but what

complainant on and prior to March 1st, 1921, was ready and willing to carry out his part of said agreement.

The prayer of said bill is for a decree requiring specific performance of said contract by the defendant.

It is contended by appellee that by the terms of the

contract itself, it appears that either party had the privilege of performing the contract, or failing to perform it, of paying to the other party $5300.00 as damages for nonperformance and that therefore a court of equity will not decree specific performance.

The question before the court upon this appeal is not whether after a full hearing a court of equity should decree specific performance. The only question before us is, does the bill upon its face state a cause of action calling for the intervetion of a court of Chancery?

In Carr et al v. Butterworth, 219 Ill. App. 14, it was said: "When a contract for sale contains a provision for liquidated damages in case of breach a court of equity will not for that reason, alone decline to enforce it in a court of equity. **Lyman v. Gedney, 114 Ill. 388; Koch v. Streuter, 218 Ill. 546; Mikelaiczak v. Krupps, 254 Ill. 209." In Cronowski v. Jozefowicz, 291 Ill. 266,** it was said: "If it had been stipulated in the written agreement that upon a failure to perform the contract the party refusing to perform shall pay $500.00 as liquidated damages, that provision would not prevent a court of equity from decreeing a specific performance."

It is claimed by appellee that appellant by the acceptance of the amount of the stipulated damages for nonperformance of the contract is barred from enforcing a specific performance of the contract in a court of equity. The bill does not allege that appellant accepted the amount of the stipulated damages for the nonperformance of the contract. The allegations of the bill in respect to the payment of the sums of $1300.00 and $4,000.00 are that said sums were paid as a part of the purchase price of the land.

We are of the opinion that the court erred in sustaining the demurrer to the amended bill. The decree of the Circuit Court is reversed and the cause remanded with directions to the Circuit Court to overrule the demurrer to the amended bill.

2760 (2)
Opinion filed July 10 - 1922

General No. 7451 Agenda No. 26

April Term A. D. 1922

George Carp, as Administrator of the Estate of Joseph Carp, Deceased, Defendant in Error,

vs.

John Gudausky, Plaintiff in Error.

Writ of Error to Vermilion County.

HEARD, J.

This is an action on the case brought by defendant in error, George Carp, as the administrator of the estate of Joseph Carp, his fourteen year old son, who died as the result of injuries received in a collision with the automobile of the plaintiff in error, while the boy was riding a bicycle on a public street in the Village of Westville, Vermilion County.

The trail resulted in a judgment of $2,000 in favor of defendant in error, to review which judgment plaintiff in error has sued out a writ of error from this court.

It is earnestly insisted that the verdict of the jury is contrary to the manifest weight of the evidence in the case. As the case must be reversed and remanded on other grounds we do not deem it proper to discuss this question.

At the request of defendant in error the court gave the jury the following instruction:

The Court instructs the jury that in suits brought to recover damages for the death of a minor child, if the proof shows that such minor child left a father or mother who were entitled to his services, then the law presumes that there has been a pecuniary loss to the father or mother from the death of such child, for which compensation may be allowed." This instruction is defective in not being terminated by the words "if you find a verdict in favor of the plaintiff" or their equivalent.

The court also gave to the jury an instruction as follows:

"The court instructs the jury that if you find a verdict in favor of the plaintiff, then you are not confined in assessing the damages to the pecuniary value, if any, of the services of the deceased child to his next of kin until he would have arrived at the age of twenty-one; but the jury may consider the pecuniary benefit, if any, which the next of kin might have derived from said de-

ceased at any of his life, had he not been killed." The damages which a jury may give in a case of this nature where they find a verdict for the plaintiff are such damages as the jury

Page 1

shall deem a fair and just compensation with reference to the pecuniary injuries resulting from the death of deceased to his next of kin.

While it is not necessary that any witness shall have expressed an opinion as to the amount of such damages and the jury may fix such sum as they deem such just and fair compensation, their finding must be based upon the evidence in the case viewed in the light of their knowledge, intelligence, observation and experience in the affairs of life. The damages allowed must not be speculative or conjectural or be in compensation of such pecuniary benefit which the next of kin "might have derived" from deceased at any age of his life had he not been killed. Deceased had he lived "might have become fabulously wealthy and he "might" have lavished his wealth upon his next of kin, but it is not reasonably certain from the evidence that he would have done so. The only damages which the jury can allow are such damages as the jury shall deem from the evidence to be fair and just compensation to the next of kin for the pecuniary injury which the evidence shows they have sustained from such death and for such pecuniary injuries as the evidence shows when considered by the jury in the light of their knowledge, intelligence, observation and experience in life are reasonably certain to result to such next of kin.

For the error in giving instructions the judgment is reversed and the cause remanded.

Page 2

Opinion filed July 10, 1922

General No. 7452 Agenda No. 27

April Term A. D. 1922

Hester Kline, Appellee,

The Estate of Elizabeth Kline Deceased; A. L. Ruffer,

vs.

Executor, Appellant.

227 I.A. 6223

Appeal from Clark.

HEARD, J.

Hester Kline, filed her claim in the county court of Clark county, Illinois, against the estate of Elizabeth Kline, deceased, for $1,000 for "care, attention, washing, nursing, general housework and supplies furnished said deceased for 5 years before her death." The case was tried in the county court without a jury and judgment obtained by the claimant against the estate in the sum of $1,000, from which an appeal was taken to the circuit court. The claimant amended her claim by increasing the demand to $2,000 and upon the case being tried before the Court and jury a judgment was obtained in the sum of $2,000 from which an appeal was taken.

Elizabeth Kline was 84 years of age living in her lifetime in Casey, Clark County, Illinois. Appellee was the wife of Henry Kline, a nephew of Elizabeth. Appellee resided with her husband in the country about 8 miles from Casey.

While the evidence shows that at various times appellee went to the home of Elizabeth taking her fruit, vegetables and other provisons and while there performed services, it is claimed by appellant that under the evidence by reason of the relationship of the parties the presumption is that the services were rendered gratiously. Mrs. Bowles a witness for appellee, testified that on different occasions Elizabeth Kline promised appellee pay for provisions and work.

In Hudson vs. Hudson, 218 Ill. App. 559, it was said: "In this case the evidence clearly shows repeated expressions by the deceased which indicated his appreciation of the value of the services which the claimant rendered for him, and that he expected to pay her for them. Some of these expressions were made within the hearing of the claimant, and under circumstances that indicated that the deceased had an understanding with the claimant about the matter of payment. The intention of the deceased to pay her, having been brought to her atten-

ton, it is a reasonable inference from the evidence that the claimant expected that the deceased would carry out his intention and promise to pay her, and that she therefore understood and expected such payment to be made and the jury were warranted in drawing

this inference from the evidence."

We think the evidence of Mrs. Bowles was sufficient to require the submission of the case to the jury as far as this question was concerned.

It is claimed that the court erred in allowing two witnesses who had been present in court and heard the testimony of some of claimant's witnesses give their opinions, based upon the testimony which they had heard without qualifying such witnesses as experts. Had this objection been made at the proper time it would have been well taken cite of: Lou Forest vs. Buirday 276 Ill. 38. It was not however, raised in the trial court and cannot be considered here. The objection made was a specific one in each instance and each time in overruling the objection the court said: "If that is the only objection it will be overruled" thereby intimating that the questions were objectionable in some other respect.

It is contended that the judgment is not sustained by the evidence in the case. To sustain a judgment for $2,000 upon a claim originally filed for $1,000 the evidence as to the services rendered and goods furnished should be clear and specific and the evidence should show what they were reasonably worth at the time and place in question and the judgment must be based upon competent evidence.

We are of the opinion especially in view of the fact that claimant filed her claim in the county court for $1000 that the judgment for $2,000 is not sufficient sustained by clear, specific and competent evidence.

The judgment is reversed and the cause remanded.

Opinion filed July 10-1922

General No. 7453 Agenda No. 50

April Term, A. D. 1922

In the matter of the Conservatorship of William Elder Karr.

Appeal from McLean. 227 I.A. 622

HEARD, J.

June 12, 1911, Wm. E. Karr, being deeply involved in financial, marital, and other difficulties, entered into an agreement with appellant whereby appellant, as trustee, assumed the control and management of Karr's affairs and continued to act as such trustee until Sept. 21, 1911, when Karr was, by the county court, adjudged to be a spendthrift and drunkard and appellant was duly apponted as conservator of Karr's estate.

Karr was the owner of 200 acres of land in McLean county inventoried at $44,000 upon which there was a mortgage indebtedness of $17,000 and accured interest. Karr also had a contract for the purchase of 744 acres of California land upon which he had paid $17,000 and agreed to pay a balance of $33,000. Karr had about $12,000 additional outstanding indebtedness. When appellant took charge of Karr's affairs foreclosure of the mortgage on the McLean county farm was threatened and the California contract was in danger of forfeiture as Karr was without funds and, by reason of his lack of financial ability and his dissipated habits, he was in danger of losing all his property. Karr also had about $4,000 worth of personal property consisting of live stock and farm machinery on the McLean county farm. Prior to June 12, 1911, Karr had been absent from home on a spree for about six weeks and his live stock and other property were suffering from lack of proper attention.

Appellant assumed the management of Karr's affairs, took him out to the farm and effected a temporary reconciliaton with his wife and had the property properly taken care of and prepared for sale; appellant during the first 90 days spending about half of his time upon the farm.

During the time of his trusteeship Appellant received from sales of personal property and other sources $7,727.77 and disbursed $7,942.92, which left a balance due appellant of $215.15.

Nov. 22, 1911, appellant procured a loan upon the farm to meet the pressing indebtedness and in the early part of 1912 entered into a contract for the sale of the

farm for $50,000.

On April 24, 1912, appellant made a report as conservator, which was approved by the county court. This report showed receipts of of $54,364.23; disbursements, $31,-745.06; balance, $22,619.17. This report was approved and

the balance appellant was authorized by the county court to apply on the completion of the purchase of the California land, appellant agreeing to advance from his private funds the remaining sum necessary to complete the purchase.

Dec. 27, 1912, appellant filed a report as conservator showing receipts which with the balance on hand at the time of his last report amounted to $24,507.43. The disbursements amounted to $20,459.96, leaving a balance on hand of $4,047.77. In this report he represented that he was entitled to the sum of $500 for his services as trustee and to the sum of $4,100, for services as conservator and trustee of Louise Karr, the wife, up to the time of filing his next report. This report was approved by the county court.

August 20, 1914, appellant filed his report as conservator in the county court showing receipts, including the balance on hand at his last report of $15,809.78, and disbursements of $16,219.97. This latter amount included $4,600 allowed to appelant for his services as trustee and conservator. This report was approved by the county court.

November 20, 1917, appellant filed his conservators report in the county court showing disbursements of $21,-543.91; receipts, $5,254.46, leaving a deficit of $16,289.45, which was caused by payment on the California land. October 9, 1918, appellant filed his conservators report in the county court reporting the sale of the California land for $50,310.00 and showing total disbursements, mostly in the repayment of loans at the bank which had been procured on appellant's personal credit, of $18,499.95, leaving a balance on hand of $32,393.89, which balance was invested in government bonds.

In his report of Nov. 20, 1917, appellant claimed commission at 5% on $5,264.52, amounting to $263.22. In his report of Oct. 1918, appellant claimed for services rendered in the sale of the Calfornia land at 3% of the selling price which claim is $1753.55. In his report of November 20, 1917 appellant reported that he had not paid himself the sum of $4,600 previously allowed but that

he had used the same to apply on the payment of the California land in order to avoid the necessity of borrowing this amount from the bank and had charged $887.04 interest thereon.

Objections were filed to the report of Oct. 1918, on behalf of Karr and Martin A. Brennan was appointed guardian ad litem for Karr. The

objections were as to the amount of commissions claimed by appellant for his services as trustee and conservator and as to the item of $887.04 claimed for interest.

After hearing the objections the county court sustained the objections and entered an order disallowing the interest item and allowing appellant $300 for his services as trustee and setting aside the allowance of $4,100 and allowing appellant $500 per year for seven years of services making a total of $3,800 for his entire services as trustee and conservator.

From this order appellant appealed to the circuit court where upon a hearing a like order was entered by the circuit court, from which order appellant has appealed to this court.

It is contended by appellant that the order of the circuit court is manifestly contrary to the evidence in the case.

Sec. 36, Chap. 86, Rev. Stats. of Ill. provides "Conservators on settlement shall be allowed such fees and compensation for their services as shall seem reasonable and just to the court."

On the hearing in the circuit court, appellant testified in detail as to the services rendered by him and by his testimony showed that Karr's financial affairs were very involved and that without the efforts of a conservator practically the entire estate would have been lost. Karr's title to his McLean county farm was defective and he became involved in expensive litigation with his wife with reference to a divorce and the duties of the conservator were rendered unusually onerous by reason of the conduct of Karr and his wife, who prevented him from procuring a loan on the California land and necessitated the loaning of appellant's personal credit to the conservatorship. The evidence tends to show that instead of Karr and his wife assisting appellant in his efforts to conserve the estate their efforts were directed in a contrary direction. One phase of this conservator-

ship was before this court in Karr vs. Rust, 217 Ill. App. 555.

Three witnesses who had knowledge of appellant's services and who were acquainted with the value of such services respectively gave it as their opinions that appellants service were reasonably worth $10,000; 8,000 and $7,500.

Appellee contends that the court in fixing fees is not bound to follow the testimony of witnesses, but should exercise an independent judgment in passing on the question of fees in any given case and cities Gentlemen vs. Sanitary Dist. 260 Ill. 317 and Remke vs. Sanitary Dist. 260 Ill. 380, in support of their contentions. These were cases where the court was required to fix an attorneys fee and the holding was that the court having knowledge on the subject could and should take into consideration his own knowledge of the services.

Appellee also cites Askew vs. Hudgens, 99 Ill. 468 and Griswold vs. Smith 214 Ill. 323. The fees involved in these cases were the fee of executors. In the latter case the court passed no opinion upon the merits of the case, but dismissed the appeal on the ground that the order appealed from was not an appealable order. Conservator's fees differ in many respects from those of an administrator. The administrator or executor simply closes the estate and his fees are for the routine proceedings in such cases and in such case the county judge should have a better knowledge of the reasonable value of such services than any other person. On the other hand it is the duty of the conservator to conserve the estate and while his services are performed under the order of the court, the services vary with each particular estate and are very frequently, as in the present case, of such character that a court would have no special reason for having knowledge of their value.

It is contended by appellee on the authority of Askew vs. Hudgens supra and Griswold vs. Smith, supra, that the county judge, from his familiarity with the affairs of the estate, with the labor and difficulty attending its settlement, and with the amount of any former allowances he may have made, enjoys peculiar means of knowledge for determining what would be the proper amount of compensation to be made to the conservator for his services, and that when such judge, in view of all circumstances, has exercised his judgment in the matter,

and determined what is the proper compensation to be allowed the conservator for his services, it would be a plain case of the wrongful exercise of judgment which would justify another court in increasing the allowance.

This is the rule laid down in Askew vs. Hudgens, supra, as to administration, but unfortunately for appellee's contention as to its application to the facts of this particular case neither the county judge or the judge of the circuit

Page 4

court from whose orders the appeals were taken were incumbents of their respective positions when the greater portion of the services were rendered so had no reason to have any special knowledge on the subject, while the county judge under whose orders the services were rendered fixed the value of a portion of such service at $4,600.00.

It is urged by appellee that as appellant was allowed in his reports sums aggregating $4455.72 for attorneys fees that that fact should be taken into consideration in fixing his fees. Appellant reported to the court the specific amounts paid for attorney's fees and as no objection was filed to them by appellee we must assume that such payments were necessary and reasonable and therefore the only effect of such evidence is to show that appellants duties were of an unusually intricate nature.

While under the law the county judge is given a discretion in fixing the fees of a conservator, this discretion is not an arbitrary one, but must have for its basis the evidence in the case. While it is the rule that when such judge in view of all the circumstances has exercised his judgment and determined the proper compensation to be allowed a court of review will not change the amount unless it is against the manifest weight of the evidence. It is also the rule that when the amount so fixed is against the mnaifest weight of the evidence the court will do so. People vs. Ballans, 294 Ill. 551.

We are of the opinion that the order of the circuit court is manifestly against the weight of the evidence and the order is therefore reversed and the cause remanded as to the amount which should be allowed appellant for his services as trustee and conservator.

Page 5

General No. 7455 Agenda No. 29

April Term A. D. 1922

H. E. Munson, Appellant,

vs.

Dee Minor, Appellee.

Appeal from Shelby.

HEARD, J.

This is an appeal from a judgment in favor of appellee in an action of forcible entry and detainer brought by appellant before a Justice of the Peace and heard upon appeal in the circuit court of Shelby County.

T. C. Dove and F. R. Dove were the owners of certain real estate in the town of Windsor in Shelby county and on July 9, 1918, they entered into an agreement with Dee Minor, appellee, upon certain conditions therein named to convey said premises to him by warranty deed and appellee entered into possession of the premises under the contract and retained such possession until the time of the trial. On August 15, 1919, appellee assigned all his rights, title and interest in that agreement to one Fraze Carmon, and on that day Carmon assigned all his rights, title and interest in the same agreement to W. B. Richards. On November 20, 1919, Richards assigned all his rights, title and interest to the Commercial State Bank. On June 22, 1920, Dee Minor, appellee, again assigned all his rights, title and interest therein to Henry Munson, appellant. All these assignments were made as collateral to secure loans made to appellee.

On July 30, 1920, T. C. Dove and wife, F. R. Dove and Dee Minor and wife conveyed to appellant by warranty deed, the same premises, described in the agreement between the Doves and appellee of date July 9, 1918, releasing and waiving homestead. On July 31, 1920, appellant entered into an agreemnt with Dee Minor, appellee, upon certain conditions therein named to convey to him by warranty deed the premises in controversy. On October 4, 1920. appellee assigned all his rights, title and interest in this last agreemnt to E. T. Swiney.

On April 19, 1921, appellee, the Doves and their wives made a quit claim deed of the premises in controversy to appellant to correct a mistake in the description of the property in the deed of July 30, 1920.

On July 13, 1921, appellant caused a written demand for possession of the premises to be served upon appellee

and possession not being given, this suit was brought.

Section 6, Chap. 2, Rev. Stats. Ill., provides that an action of Forcible Entry and Detainer may be maintained "When lands or tenements have

been conveyed by and grantor in possession, * * and the grantor in possession, * * * refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent." It is contended by appellant that appellee having conveyed the premises in question to appellant and having refused to surrender possession thereof after demand in writing, that these facts are conclusive and that upon such facts being shown appellant was entitled to recover.

The action of forcible entry and detainer is a possessory action and to entitle a plaintiff to recover under the provisions of the statute above quoted or any other provisions of such statute, he must show that he is entitled to the possession of the premises. It is not sufficient to show that the defendant is not entitled to the possession.

There is evidence in the record tending to show that while appellee's deeds to appellant were absolute in form they were in fact intended as a mortgage to secure an indebtedness from appellee to appellant and it is contended by appellee that under the rule laid down in West vs. Frederick, 62 Ill. 191, the grantee in a deed absolute in form, but in fact a mortgage, can not maintain forcible entry and detainer against the grantor. This position seems to be sustained by the weight of authority.

By the terms of the contract for a deed of July 31, 1920, between appellant and appellee, appellee was entitled to the possession of the premises so long as he made the payments and performed the covenants or agreements on his part to be performed. It was only on his failure so to do that appellant would "have the right to re-enter and take possession of the premises aforesaid with notice." There is no evidence in the record that appellee failed to make any of the payments or to perform any of the covenants or agreements specified in the agreement to be performed by him.

We are of the opinion that the judgment of the circuit court is sustained by the evidence in the case and the judgment is affirmed.

(276 A) Opinion filed July 10 1922
Rehearing denied Oct 4, 1922

General No. 7458 Agenda No. 52

April Term, A. D. 1922

Charles Branham, for the use of Brice Squires, Appellant,

vs.

Mary L. Gerrard and William Gerrard, Appellees.

Appeal from Vermilion.

HEARD, J.

This is an appeal from a judgment in favor of apellee against appellant for costs and in bar of an action in assumpsit brought by appellant against appellees, Dec. 29, 1920, to recover an advance payment of $2,000 made by appellant to appellees upon a land purchase contract.

The declaration consisted of the common counts and a special count setting up a contract between appellees and Branham by which appellees agreed to sell to Branham certain real estate; that said contact had been assigned by Branham to Brice Squires; that the contract specified that appellees should furnish an abstract of title showing good and sufficient merchantable title as of date of sale; that it was also stated in the contract that in the event of any defects being found in the title making the same unmerchantabe, that appellees were to have a reasonable time in which to correct the same; that Branham made an advance payment of $2,000; that appellees failed to furnish to appellant a good, sufficient and merchantable title to said lands as of the said date of sale; and further that appellees did not keep their promise to correct the defects in such title, so as to make the same merchantable within a reasonable time.

Appellees filed a plea of the general issue and a plea denying that Squires was ready and willing to pay the balance of the purchase money and to carry out his part of the contract, and alleging that appellees did not fail, neglect or refuse to make Squires a merchantable title to said lands in a reasonable time.

It appears from the evidence that on March 6, 1920, at the office of Ralph B. Holmes, an attorney, at Danville, Ill., a contract for the sale and purchase of 120 acres of land was drawn up and signed by appellees and Branham (it being understood before the deal was closed that the real purchaser was Squires). It stipulated for a purchase price of $29,040, of which $2,000 was paid cash in hand. The transfer was to be by warranty deed, which was to be exectued by appellees and placed in the

custody of Holmes for final delivery.

The contract specified that the seller should furnish an abstract of title "showing good and sufficient merchantable title in first parties, as of date of sale."

It is also stated in the contract that in the event of any defects being found in said title making the same unmerchantable, that appellees were to have a reasonable time in which to correct the same.

It appears from the evidence that it was then and there agreed that the abstract of title should be submitted to George F. Rearick, of the firm of Rearick & Meeks attorneys, for examination, as to the title, on behalf of the purchaser.

An abstract certified to March 5, 1920, was, within a few days after the signing of the contract, delivered to the above firm.

Under date of March 17, 1920, said attorneys gave a written opinion, in which defects were pointed out, and concluding that in their opinion the title could not be approved as merchantable, unless other facts not shown of record should make it so. The opinion asked for certain information concerning a family of the name of White, who were parties to a partition suit which involved the premises in question. An affidavit by two of the White sisters was procured and thereupon the abstract with the affidavit and a written citation of authorities was again submitted to the attorneys for the purchaser, and on April 14, 1920, said attorneys again gave their written opinion that they would not approve the title as merchantable and suggested that the matter should be cured by quiet title proceedings. The terms of court of Vermilion county are in May, October and January.

The last day for publiciation for the May, 1920 term was April 16th. Appellees lived at Ridgefarm, 18 miles from Danville. They were immediately notified of the opinion of appellant's attorneys and authorized Mr. Holmes to take the necessary steps to correct the title on the following day.

The abstract offered in evidence shows that the persons to be made parties to the suit were many and widely scattered and that it would be absolutely impossible for anyone even familiar with the facts to prepare a bill to quiet title, ascertain who were the necessary parties, and secure the necessary affidavits within the two days

[illegible] of Nelson Terminal delivery.

Page 1

The contract provided that the seller should furnish an abstract of title showing good and sufficient merchantable title in first party, as of date of sale."

It is also provided in the contract that in the event of any defects being found in said title making the same unmerchantable, then first party shall have a reasonable time in which to correct the same.

It appears from the evidence that it was then and there agreed that the abstract of title should be submitted to George F. Rearick, of the firm of Rearick & [illegible], attorneys, for examination, as to the title on behalf of the purchaser.

An abstract certified to March 5, 1920, was [illegible] few days after the signing of the contract [illegible] the above firm.

Under date of March 17, 1920, said attorneys [illegible] written opinion, in which defects were pointed out and [illegible] stating that in their opinion the title [illegible] proved a merchantable [illegible] period would be lost. The [illegible] [illegible] were parties [illegible] [illegible] sisters [illegible] affidavit and a [illegible] submitted to the attorneys for [illegible] April 1, 1920, said attorneys [illegible] out that [illegible] affidavit suggested that [illegible] [illegible] must be in May, [illegible]

The last day for publication [illegible] was April 16th. Appellees lived at [illegible] from Danville. They [illegible] opinion of appellant's attorneys [illegible] pose to take the necessary [illegible] the following day.

The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

time.

A bill to quiet the title was filed for the succeeding October

term of court; a decree was had quieting title in Mary L. Gerrard; the abstract was extended and furnished to Rearick & Meeks, attorneys for appellants. It was then discovered by Mr. Rearicks that only three weeks publication notice had been had to non-resident heirs instead of the four, required by statute, through error. The decree was thereupon vacated and leave taken to amend the bill, which, after consultation with, and suggestions from, appellants attorneys, was done, a new affidavit of non residents filed and publication for the January 1921 term of court.

On Nov. 27, 1920, Squires notified appellees by letter that they had not complied with their contract, had not furnished a merchantable title and had not corrected the defects within a reasonable time and gave notice that he rescinded the contract and demanded the payment of $2,000 which had been made by Branham together with interest and damages.

Upon the trial the court held that at the time of the comencement of the suit the title had not been made merchantable.

Under the pleadings and evidence in the case the only question which arises upon this record is whether or not on Nov. 27, 1920, a reasonable time had elapsed within which to correct the defects in the title and make it merchantable.

It is contended by apellant that the facts being practically undisputed this court should hold as a matter of law that a reasonable time had elapsed. In Morris vs. Wibaux, 159 Ill. 627, it was said: "The law cannot prescribe in general what shall be a reasonable time except on certain and determined facts, because the question must depend upon the situation of the parties and circumstances peculiar to each case. Where the law itself prescribes what shall be reasonable time in respect to a given subject the question is one of law, and the jury is confined to finding the facts as to the subject. Whenever the special facts are such that the court cannot by the aid of any legal rule or principle, decide upon the legal quality of the facts, the jury must draw the inference as to what is a reasonable time with reference to the ordinary course and practice of dealing under the circumstan-

A [illegible] that the title [illegible] the [illegible]
October

Page 2

term of court: a decree was had [illegible] title in Mary [illegible] Garnett the abstract was [illegible] and furnished to Stewart & Stewart, attorneys for appellant. It was then discovered [illegible] that only [illegible] weeks publication notice had been had [illegible] heirs instead of the four required by [illegible] error. The [illegible] to [illegible] the [illegible] with, and suggestions from, appellant's attorneys was done, a new affidavit of non residents filed and publication of the January 1921 term of court.

On Nov. [illegible] 1920, [illegible] that they had not complied with their [illegible] demanded a [illegible] that [illegible] had not [illegible] the defects [illegible] and [illegible] that [illegible] rescinded the contract and demanded the [illegible] $2,[illegible] which had been [illegible] with interest and damages.

Upon the trial the court held that [illegible] [illegible] of [illegible] merchantable.

Under the [illegible] the [illegible] only question [illegible] that on Nov. [illegible], 1920, [illegible] a [illegible] to convey the [illegible] merchantable.

It is contended [illegible] by [illegible] that [illegible] a reasonable [illegible] Wilson, 153 [illegible] 827, [illegible] ... [illegible] on contract and [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] the [illegible] question [illegible] [illegible] the [illegible] [illegible] of the [illegible] [illegible] [illegible]

ces of the particular case (Citing authorities). The question as to reasonable time being one of fact, ordinarily the time is reasonable or unreasonable, in point of law, according to the finding of the jury in point of fact."

Reasonable time has been defined as follows: "So much time as is necessary under the circumstances for a reasonably prudent and diligent man to do, conveniently, what the contract or duty requires should be done having a regard for the rights and possibilities of loss, if any, to the other party to be affected. Citizens Bank Bldg. vs. Wertheimer, 126 Ark. 38.

"Reasonable time is so much as is necessary under the circumstances to do conveniently what the contract or duty requires in the particular case should be done." Bowen vs. Detroit City R. R. 54 Mich. 501.

In Gridley vs. Globe Tobacco Co. 71 Mich. 528, it was said: "The rule that certain acts shall be performed in a reasonable time requires that such reasonable dilgience shall be exercised as under then and all subsequently existing circumstances may fairly be expected."

In Emmerson vs. North Amer. Trans. Co. 303 Ill. 282, "The most recent case where the subject it was held that the question of what would be a reasonably time was ordinarily a question of fact."

Under the circumstances of this case what was a reasonable time was clearly a question of fact for the jury and we cannot say that their finding upon this question was manifestly against the weight of the evidence.

Some complaint is made of the court's rulings in the giving and refusing of instructions. We find no error in that respect.

Much space in the briefs and arguments of both parties is devoted to the question of whether the title was made merchantable by a decree in Feb. 1921. Under the pleadings and evidence in this case that question is not before the court.

The judgment is affirmed.

[illegible]

[illegible]

[illegible]

General No. 7465. Agenda No. 38.

April Term, A. D. 1922

John E. Neddermann, Appellee,

vs.

City of Pekin, Appellant.

Appeal from Tazewell.

HEARD, J.

This case was commenced by appellee against appellant to recover damages which he received by being run into and injured by a street car operated by the city, by reason of its careless and negligent operation. A trial of the case resulted in a judgment for appellee against appellant for $850. damages and costs, from which judgment this appeal was taken.

It is contended that appellee's given instruction No. 2 is erroneous. This instruction tells the jury that the greater weight of the evidence is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It then enumerates certain things which it tells the jury they should take into consideration, omitting from this enumeration all references to the number of witnesses and tell the jury in conclusion that "from all these circumstances determine upon which side is the weight of the evidence". While the weight of the evidence is not alone determined by the number of witnesses testifying to a particular fact or state of facts it is one of the elements which the jury should consider. The weight of the evidence is to be determined not solely from a consideration of the matters enumerated in the duty of the jury to consider, as well, all the evidence in the case. This instruction has been repeatedly condemned and should have been refused. Chicago Union Traction Co. vs. Hampe, 228 Ill. 346; Lyons vs. Ryenson, 242 Ill. 409. The seventh of appellee's instructions single out a single fact, which it tells the jury they should take into account.

At the request of appellee the court gave the jury the following instruction: "The Court also instructs the jury as a matter of law that it is the duty of those in control of a street car as well as those driving a team and vehicle, to exercise a greater degree of care and watchfulness at street intersections in a thickly populated and heavily travelled portion of the city than at other places

not intersections and not so thickly populated." This instruction is erroneous. While a greater amount of care may be required at street intersections, than other places the degree of care required, which is ordinary care, is the same.

The judgment is reversed **and the cause remanded.**

Opinion filed July 10-1922

General No. 7467 Agenda No. 39

April Term, A. D. 1922

Charles P. Saillard Appellant,

vs.

Frank Schaefer, Appellee.

Appellee from Sangamon.

HEARD, J.

In this case a general demurrer interposed to an amended declaration was sustained by the Court, whereupon plaintiff elected to abide by the amended declaration and judgment was rendered against plaintiff, in bar of action and for costs of suit. It is from this judgment that this appeal is prosecuted.

The charging part of the first count of the amendment declaration is substantially as follows: "For that, Whereas, defendant on the 28th day of June, A. D. 1921, was the owner of a certain residence building in Springfield Illinois, commonly called a flat building or apartment house, which defendant their owned and used for the purpose of leasing to persons who might desire to live therein; and plaintiff avers that on the date aforesaid, and prior thereto,, said building has been and was leased to divers persons who were then and there residing as tenants; and plaintiff avers that on the north side of said building, on what is known as the front thereof, defendant kept and maintained a certain large porch, which said porch was then and there reserved by defendant from his said leases to the said divers tenants, and was then and there maintained and controlled by defendants as a common passageway or entrance for the various tenants living in said flat building, and for all other persons who should rightfully enter and leave the said building; and plaintiff avers that on the date aforesaid, he was then and there a tenant in said premises and as such, used and occupied a certain room on the second floor of the said building by means whereof, it became and was necessary for plaintiff to use the aforesaid porch or common passageway as means of ingress and egress to and from the aforesaid rooms so used and occupied by plaintiff.

And plaintiff avers that by means of the premises it became and was the duty of the defendant to maintain said porch or common passageway in a reasonably safe condition, so as not to injure plaintiff in his

going and coming through and upon said common passage way, but defendant did not regard his duty in this behalf, but on the contrary thereof, allowed a certain part of said common passage way, to-wit, a railing around same to become defective, rotten and loose, to an unreasonable degree and so to remain for a long period of time all of which the defendant then and there had notice

Page 1

or in the exercise of reasonable care in that behalf would have had notice; and plaintiff avers that on the date aforesaid, while he was upon and along said common passage way and while he was attempting to enter the premises, so used and occupied by him by means of said common passageway, and while he was where he had a right to be, and while he was in the exercise of due care and caution of his own safety, he there casually leaned against said railing and that said railing, by means of the loose, rotten, defective and unsafe condition, aforesaid, then and there gave away and caused plaintiff to fall to and upon the ground in a forceful and violent manner, by means whereof, plaintiff was then and thereby seriously and painfully injured, etc."

In this state many of the superficial and artificial forms of common law pleading have been abandoned and a declaration is now held to be good which in plain and simple language states the essential elements of a cause of action.

In McClure v. Hoopeston Gas Co., 303 Ill. 89 ,the court said:

"This court has stated, in harmony with the authorities on the question, that the essential elements of a cause of action for negligence are: (1) The existence of a duty on the part of a person charged to protect the complaining party from the injury received; (2) a failure to perform that duty; and (3) an injury resulting from such failure. (Devaney v. Otis Elevator Co. 251 Ill. 28.)

In Smith vs. Morrow, 220 Ill. App. 627, it was said: "The law is well settled in this State that a landlord who rents different parts of a building to various tenants and retains control of the stairways, passageways, hallways and other methods of approach to the several portions of the building for the common use of the tenants, has resting upon him an implied duty to use reasonable care to keep such places in a reasonable safe condition, and that he is liable for injuries which result to persons who

are lawfully in such building, from a failure to perform such duty." (B. Shoninger Co. vs. Mann. 219 Ill. 242.)"

We are of the opinion that the first count of the amended declaration, tested by the rules laid down in the authorities above cited stated a duty on the part of the defendant to protect the plaintiff from the injury received, a failure to perform that duty and an injury resulting from such failure.

Page 2

The first count of the amended declaration having stated all the essential elements of a cause of action it was error to sustain the demurrer to it. The judgment is reversed and the cause remanded with directions to the circuit court to overrule the demurrer to the first count of plaintff's amended declaration.

Page 3

(27)

Opinion filed July 10, 1922

General No. 7471 Agenda No. 41

April Term A. D. 1921

John E. Ingersoll, Appellee

vs.

The Union Automobile Insurance Association
Appellant

Appeal from Tazewell

227 I.A. 6234

HEARD J.

This is an appeal from a judgment for $793.33 in favor of appellee against appellant in an action of assumpsit on a policy of insurance brought to recover loss sustained by appellee by reason of a fire destroying the automobile to insure which the insurance policy had been issued by appellant.

It is contended by appellant that appellee having alleged in his declaration a full compliance with the conditions of the policy, the burden was upon him to show that proofs of loss were furnished as provided for by the policy and that having failed to furnish such proof appellee was not entitled to recover upon proof of waiver of performance. While this is ordinarily the correct rule (Hensel vs. C. L. N. Ins Co. 219 Ill. App. 77) in the present case appellee filed with his declaration an affidavit of claim and defendant filed with his plea an affidavit of merits in which the only defense set up was that the policy had been cancelled and was not in force at the time of the loss. Appellant was confined to the defenses set up in his affidavit of merits and not having set up therein a failure to furnish proofs of loss cannot now urge such failures as a defense.

The policy in question was issued to appellee April 10, 1918, insuring an Overland automobile for the sum of $900. Under the rules of the association an assessment of $11.25 became due on October 10, 1918, as appellee's pro rata share of the losses of the association for the past six months.

Demand for the payment of this assessment was made upon appellee, who failed to pay it, and afterwards, in January 1919, L. F. Shepard, the secretary and general manager of the association, who had authority to employ and appoint agents and give authority to the agents of the association, sent out one Fred C. Rudolphsen to collect, among other delinquent claims, the claim against the plaintiff, and to arrange with the plaintiff.

and other delinquent subscribers, for the reinstatement or cancellation of the lapsed policies as the subscribers might wish, and gave to him authority to enter into cancellation agreements with delinquent subscribers. Mr. Shepard gave Mr. Rudolphsen a list of the subscribers whose policies had lapsed, asked him to see each of them personally and explain to them that the premium deposits were due the association because the association

had carried insurance for them for a period of six months prior to October 1918, and that the amount was due for the protection they had received during that period. He also authorized Rudolphsen to ascertain from each subscriber whether or not it was the subscriber's desire to continue or cancel the policy and to inform them that if they did not desire to continue the policy, no further charges against them would be made. He also instructed Rudolphsen to report the wishes of each subscriber that he interviewed back to the office of the association on his return. The plaintiff, Ingersoll, was one of the partes on the list which Shepard gave to Rudolphsen, With the list given to him by Mr. Shepard, Rudolphsen went to Delavan, Illinois, where plaintiff resided and found Ingersoll at his home.

There is a direct conflict in the evidence as to what took place at the interview between appellee and Rudolphsn. Rudolphsen testified that appellee met him at the door and he (Rudolphsen) explained to him that the assessment was due and appellee stated that he did not like the company and had dropped the insurance; that he (Rudolphsen) explained to him that he could drop the insurance any time that he was dissatisfied but that cancellation would not relieve him from paying the assessments then due and that appellee then said that he would pay the amount of the assessment and invited Rudolphsen into the house; that appellee gave him a check for the amount of the assessment and that he asked appellee if he wanted to continue the policy and appellee said he did not wish to keep the policy any longer, that he wanted it cancelled and that he told appellee he would cancel the policy as soon as he returned to the home office; that he asked appellee for the policy and appellee looked for it, but did not find it; that he asked appellee to send it to the home office and appellee agreed to do that; that he then receipted the deposit assessment notice, marking it paid in full, dating it and signing his

name to it and gave the receipt to appellee and reported the matter to the insurance office the next day for cancellation; that appellee in the conversation told him that he did not want any more assessment notices coming to his house as he would not

not pay them. Appellee directly contradicts the greater part of this testimony and testifies that he did not make the statement to the witness, Rudolphsen, that he had dropped the insurance and that he did not tell Rudolphsen that he would drop the insurance; that Rudolphsen, did not ask appellee if he wanted to continue the policy and appellee did not tell him that he did not wish to keep it, or that he wanted it cancelled; that he did not ask appellee if the policy might be in the safety deposit box in the bank, and appellee did not agree to send the policy to the home office of appellant, at Bloomington; that Rudolphsen did not ask appellee for the policy or tell him that he would have to return the policy when he cancelled it. Rudolphsen testified that when he received the check from appellee he made a notation on his list marking the letters "Pd" and the letter "C" on the list before he left appellee's home.

The witness Rudolphsen when being examined with reference to these notations was asked the question "What is the meaning of these initilas or letters?" To this queston an objection that it was incompetent and immaterial was sustained. It was proper to explain the meaning of these notations. People vs. Thompson, 295 Ill. 187.

When Rudolphsen reported the collection and cancellation to the company on June 25, 1919, a bookkeeper for the association wrote upon appellee's application the words "Cancelled January 25, 1919." The policy was also marked cancelled on a card record thereof kept by the association on the policy register.

On Cross examination of the witness Rudolpsen when he was being examined as to his talk with appellee with reference to the cancellation of the policy, he was asked this question: "You knew that must be in writing?" Objection was made to the question and the objection improperly overruled. While the policy of insurance contained a provision: "This policy may be cancelled at any time by the subscriber by giving written notice to the association but such concellation shall not relieve a sub-

scriber from paying any assessment levied against him prior to the date of his request for cancellation" this was not the only manner in which it could be cancelled. An ordinary policy of insurance can always be cancelled by a mutual agreement therefor made between the insured and an agent of the insurance company authorized to make such agreement on behalf of the company.

In the conflicting state of the record it was necessary that the jury should be accurately instructed. At the request of appellee the court gave to the jury the following instruction: "The jury are instructed that the greater weight of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the greater weight of the evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the result of the suit; the probability or improbability of the truth of their several statements in view of all other evidence, facts and circumstances proved on the trial and from all these circumstances, determine upon which side is the weight of the evidence." This instruction has frequently been critisized. It eliminates the number of witnesses testifying to a fact or state of facts as one of the elements in the determination of the question of the weight of the evidence. It is misleading in enumerating certain elements and telling the jury they "should" consider them. It is erroneous in enumerating certain elements and telling the jury that "from all these circumstances" the jury should determine upon which side is the weight of the evidence. The instruction omits many elements proper for the jury to take into consideration in determining the question. The jury must determine upon which side is the weight of the evidence from a consideration of "all the facts and circumstances in evidence" and not from the certain facts and circumstances in evidence enumerated in this instruction.

Appellee's third given instruction is as follows: "The court instructs the jury that you are the judges of the credibility of witnesses and of the weight to be attached to the testimony of each and all of them; and you are not bound to take the testimony of any witness as absolutely true; and you should not do so, if you are satis-

fied from all the facts and circumstances proved on the trial that such witness is mistaken in the matters testified to by him or her or that for any other reason his or her testimony is untrue or unreliable." This instruction is erroneous. It allows the jury to reject the testimony of a witness if for any reason, not based upon the evidence, they are satisfied that his testimony is untrue or unreliable. Some people are so prejudiced against insurance companes in general that "for that reason" they consider the testimony of all

employees of insurance companies as unreliable.

Complaint is made of the giving of an instruction which told the jury that before appellant could cancel the policy it must have been requested to do so by appellee. This is not an accurate statement of the law. A policy can be cancelled by mutual consent and in such case it is immaterial whether the request comes from the insured or insurer.

The judgment of the circuit court is reversed and the cause remanded.

(2768 R)

Opinion filed July 10, 1922

Certiorari denied

General No. 7475 Agenda No. 44

April Term A. D. 1922

Mary A. Grainey, Appellee

vs.

Neil H. Schafer, et al, Appellants.

Appeal from Montgomery

227 I.A. 625

HEARD, J.

Appellee, in the circuit court of Montgomery county, recovered a judgment for $5,382.66 against appellants in an action of assumpsit brought upon two promissory notes executed by appellants and payable one to "Micheal J. Grainery or Mary A. Grainery or order" and the other payable to "the order of Mary or Michael Grainery."

Appellants filed during the course of the pleading, seven pleas to the declaration to each of which the court sustained a demurrer. These pleas were verified by affidavits of merits and the affidavits were stricken from the files.

Appellants stood by their pleas and the only errors here relied upon are that the court erred in sustaining the demurrers and striking the affidavits of merits from the files.

The pleas and affidavits of merits were very lengthy but in substance they set forth that no consideration for the notes passed from appellee to appellants; that they would never have borrowed the money for which the notes in question were given from appellee's husband and would never have executed the notes, had it not been for the solicitations of appellee's husband and promise that he would never collect the same, but would give share out of his estate; that appellants, because of the promise to return said notes and never collect the same and to make a gift of the notes in question to appellants and solely on that account purchased two certain tracts of real estate situated in Montgomery county, one being purchased at the time the first note was executed and the smaller tract purchased at the time the secondn ote was executed and the sixth and seventh special pleas further set forth that appellants invested $4,000 of their own funds, which they had prior to the time the advancement was made by appellant's husband, which funds of their own they would not have invested had it not been for such promise of appellee's husband; that Michael Grainery who was the payee in the alter-

native with his wife in both notes, while he was still in possession of the same, and while he was sick in bed at his home in the presence of his wife, the appellee made a gift of the notes to the appellant, Georgia G. Schafer, and directed the appellee to get the notes, which were then in

Page 1

the home of the two payees and deliver the same to the appellant, Georgia G. Schafer, and that appellee Mary Grainery promised to do so, but pretended she could not find the same, but that her promise was fraudulent and deceitful and that she wrongfully and fraudulently promised to turn the same over to appellants, although at the same time were given to appellants by the lawful owner; that the payment of said notes or the rendition of a judgment against the defendants by the plaintiff on said notes for the principal sum and the issuing of an execution and enforcement of said judgment will inevitably cause the bankruptcy of the defendants.

While many of the artificialties of ancient pleading are no longer necessary in this state every allegation of the plea is to be taken most strongly against the pleader and a plea to be good must state a good defense to the action or some part thereof.

The pleas in this case while purporting to allege a lack of consideration alleged facts showing a consideration for the notes. The pleas sought to vary the written terms of a contract by parol evidence; they sought to set up a gift of the notes by Michael Grainery, but fail to set up facts sufficient to show a gift, either inter vivos or or causi mortis, and attempt to set up an estoppel, but the facts so set up constitute no defense to the notes. Rothwell vs. Taylor 303 Ill. 226.

The demurrers were properly sustained and it folows in natural sequence that the affidavit of merits was properly stricken from the files.

The judgment is affirmed.

Page 2

2769a

Opinion filed July 10, 1922
Rehearing denied Oct 4, 1922

General No. 7476 Agenda No. 45

April Term, A. D. 1922

Joseph Madison, Jr., by Joseph Madison, Sr., his Next Friend, Appellee,

vs.

227 I.A. 624

Loose-Wiles Biscuit Company, a Corporation, Appellant.

Appeal from Sangamon.

HEARD, J.

This is an appeal from a judgment for $4,000 in a suit in trespass brought by Joseph Madison, Jr., a minor by his next friend, Joseph Madison, Sr., against the Loos-Wiles Biscuit Company,a corporation, to recover damages for personal injuries sustained by Joseph Madison, Jr., on January 29, 1918, by reason of appellant's motor truck, on which Joseph Jr., was riding, striking a snow drift, thereby turning it over on him, breaking his leg and otherwise injuring him.

The evidence shows that at the time of the accident one of the bones of Joseph Jr.s thigh was broken and that at a time subsequence thereto while walking in the street on crutches he slipped and fell and broke his leg in another place.

The court gave to the jury the following instruction:

"If you find the defendant guilty, you may assess the plaintiff's damages, if any, at such sum as you believe from the evidence will fully and fairly compensate him for the injuries he has sustained." This instruction does not limit plaintiff's recovery to the injuries which Joseph Madison Jr., had sustained as the proximate result of defendant's wilful negligence, but allowed the jury to assess damages for all injuries plaintiff had sustained wheth- proximately resulting from such negligence or not. It was a controverted question in their case whether the second injury to Joseph, Jr., was a proximate result of the first injury or was the result of negligence on his part. The giving of this instruction was erroneous as was also the giving of another instruction, on the subject of damages, for the same reason.

The judgment is reversed and the cause remanded.

(27 I.A.)

Opinion filed July 10, 1922
Rehearing denied Oct. 1, 1922

General No. 7479 Agenda No. 59

April Term, A. D. 1922

John J. Logan, Appellee,

vs.

Frank Rees, Appellant

227 I.A. 624

Appeal from the Circuit Court of Adams County.

HEARD, J.

This is an appeal from a judgment of $871, damages in favor of appellant in an action for fraud and deceit.

The declaration charges in substance that on July 1st, 1919, appellee bargained with appellant to buy of appellant certain hogs and that appellant for the purpose of inducing appellee to buy said hogs falsely and fraudulently represented and stated to appellee that said hogs were sound and healthy and free from hog cholera and other contagious diseases and that they had been theretofore vaccinated as a preventative of hog cholera; that said statements were false; that said statements were then and there known to appellant to be false; that appellee believed them to be true and confiding in their truth bought of appellant the said hogs for $711; that said hogs were not sound and healthy; that they had not been vaccinated as a preventative for hog cholera and that said hogs sickened and died.

Complaint is made of the giving of all of the instructons given at the request of appellee but our attention is not called by appellant in his brief and argument to any particular in which any one of these instructions is in accurate or in correct.

While a court of review will search the record for the purpose of affirming a judgment it will not search for or consider errors not specifically pointed out by the appellant in his brief and argument and all alleged errors not specificially pointed out will be considered as having been waived.

It is claimed by the appellant that the evidence in the case does not establish a case of fraud and deceit.

In Billstrom vs. T. T. T. Co. 220 Ill. App. 550 it was said "In order to establish an action for fraud and deceit the evidence in the case must show 1 That the representations as charged in the declaration were made by the defendants or one of them. 2 That the representations were false and known to be false by the defen-

dants making them or made as a positive assertion recklessly without any knowledge of its truth and such representations must be made to deceive the Plaintiff. 3. That the plaintiff believed the representations to be true. 4. That the plaintiff making the purchase or entering into the contract relied upon the representations and was induced to make the purchase or enter into the contract because of the same. 5. That the plaintiff has suffered damages thereby."

Appellee testified that when negotiating with appellant for the sale of the hogs that he told appellant he would buy provided he could get a full car and get healthy hogs but that he would not buy hogs that had not been vaccinated; and that appellant told him that all his hogs had been vaccinated about three weeks previous and that they were all healthy and all right and that they then agreed upon the prices appellee was to pay for the hogs.

Appellant denied these statements entirely and testified that appellee did not ask him whether any of the hogs had been vaccinated; that vaccination was never mentioned; that here was nothing said about health and that the only thing discussed was the price. Appellant is corroborated by other persons who were near at the time of the conversation but say that they did not hear the subject of vaccination or health discussed. There was evidence of one witness that he looked at the hogs the day before the sale and that some of them did not appear to be well.

There is also evidence that while some of the hogs had been vaccinated others had not.

Within a day or two after the purchase some of the hogs sickened and within a short time they all died the disease being diagnosed as hog cholera.

Appellant testified that when sold the hogs were all healthy and this he is corroberated by other witnesses. While the number of witnesses testifying on each side as to a particular fact or state of facts is a proper element to be considered by the jury in determining upon which side the preponderance of the evidence is as to such fact or state of facts, the preponderance of the evidence is not alone determined by the number of witnesses tesifying for or against the existence of such fact or state of facts. The preponderance of the evidence is to

dant, making them or made as a positive [illegible] lessly without any knowledge of its truth and [illegible] representations must be made to deceive the [illegible]. That the plaintiff believed the representations to be true. 4. That the plaintiff making the purchase [illegible] tering into the contract relied upon the representations and was induced to make the purchase or enter into the contract because of the same. 5. That the plaintiff [illegible] suffered damages thereby."

Appellee testified that when negotiating with [illegible] pellant for the sale of the hogs that he told appellant he would buy provided he could get a full car and pure healthy hogs but that he would not buy hogs that had not been vaccinated; and that appellant told him that all his hogs had been vaccinated; that these were pure hogs and that they were all healthy and all right; and that they then agreed upon the price appellee was to pay for the hogs.

Appellant denied these statements and testified that appellee did not ask him whether the hogs had been vaccinated; that vaccination was not mentioned; that there was nothing said about healthy; that the matter [illegible] Appellee's [illegible] corroborated by other witnesses who were present. [illegible] line of the conversation [illegible] and not [illegible] the subject of vaccination [illegible] Appellant [illegible] was evidence of [illegible] the day before [illegible] appear to be well.

Page 2

while some of the hogs had [illegible] not

Within a day or two after [illegible] hogs scattered [illegible] died being [illegible]

Appellant [illegible] healthy and that he [illegible] While the number [illegible] as to a particular [illegible] must to be considered by [illegible] which made the purchase [illegible] such [illegible] defense that about [illegible] as tending for or against the [illegible] state of facts. The [illegible]

be determined by the jury from a consideration of all the evidence in the case.

In this case if the evidence produced by appellee is believed then appellee proved all the elements necessary to estabish a case of fraud and deceit. If appellant and his witnesses are believed then appellee has not established such case. Weighing the evidence is peculiarly the province of the jury and they having found in favor of the appellee upon the controverted questions of fact and their finding having been approved by the Judge who saw and heard the evidence, we cannot say that the verdict of the jury is so manifestly contrary to weight of the evidence as to warrant us in setting aside their finding.

The Judgment is Affirmed.

[illegible] determined by the jury from a consideration of all the evidence in the case.

In this case if the evidence produced by appellee is believed to be true as proved all the elements necessary to establish a case of fraud and deceit. If appellant and his witnesses are believed then appellee has not certainly made a case. Weighing the evidence in proper case the province of the jury and they having found in favor of the appellee upon the controverted question of fact and their finding having been approved by the judge who saw and heard the witnesses we cannot say that the verdict of the jury is so manifestly contrary to weight of the evidence as to warrant us in setting aside their finding.

The judgment is Affirmed.

Opinion filed July 10, 1922

General No. 7480 Agenda No. 47

April Term A. D. 1922

H. M. Rudolph, Appellee,

vs.

The County of Ford, in the State of Illinois, and the Members of the Board of Supervisors of the County of Ford in the State of Illinois, to-wit: W. M. Miller, Geo. M. Farley, A. D. Thompson, J. K. Montelius, J. E. Parkins, Peter C. Anderson, Onno Arends, E. D. Cameron, James A. Jordan, W. A. Kreitzer, Albert Froyd, Fred Danielson, (Ass't Supervisor) and Sherman Frederick, as members of the said Board of Supervisors of the County of Ford in the State of Illinois, Appellants.

Appeal from Ford.

227 I.A. 624

HEARD, J.

Appellee by leave of court filed a petition for a writ of mandamus, setting forth that in November 1918, he was elected county superintendent of schools of Ford county for a term of four years from August 1, 1919; that at the June 1919 meeting of the Board of Supervisors of said county a resolution fixing salaries of county officers was passed as follows:

"Moved by Supervisor Althouse, seconded by Supervisor Froyd, salaries of County Officers as fixed by the Board and read by the Clerk shall be approved as read. Carried.

Sheriff	$1500.00 and expenses
Deputy	1000.00
Circuit Clerk	1500.00
Deputy	1000.00
Treasurer	1500.00
Deputy hire $900.	600.00 for extra clerk
State's Attorney	1700.00

Superintendent of Schools $1500.00 and $1,000.00 extra compensation. Motion carried;" that by this motion his extra compensation as county superintendent of schools was fixed at $1500 and $1000 or $2500 per annum; that although such extra compensation had been fixed at said sum no provision had been made for its payment; that for several quarters he had presented bills for $250.00 per quarter and that the same had been allowed and paid to him; that there was due at the time of filing the petiton $3291.67

ty-one Dollars and Sixty-seven cents ($3,291.67) payable to H. M. Rudolph, County Superintendent of Schools, for extra compensation due him up to November 4th, 1921.

And commanding T. A. Flora, County Treasurer of the county of Ford or his successor or successors in office to countersign said check or order so to be issued by the County Clerk and pay the same.

Appellants answered in substance that the salary of County Superintendent of Schools of said county, as fixed by statute at the time said motion was made, was $1500.00 per annum, and that by the adoption of said motion the extra compensation of appellee for his term of office was fixed at $1,000.00 and that by presenting his bills to the county for $250.00 per quarter, and collecting payment in accordance therewith that appellee is estopped from claiming any additional compensation above $250.00 per quarter.

Appelee demurred to the answer to the petition and amendment, and appellants moved to carry the demurrer back. The demurrer to the answer was sustained and the motion to carry the demurrer back, was denied. Appellants elected to stand by their answer and motion and moved in arrest of judgment. This motion was denied, and a writ of mandamus was awarded as prayed for in the petition.

Appellants prayed this appeal and contend that the court erred in allowing the motion to file the petition; in sustaining the demurrer to the answers; in overruling the motion to carry the demurrer back to the petition and amendments thereto; in overruling the motion in arrest of judgment, and in rendering the judgment for appellee.

We do not deem it necessary in this case to decide whether mandamus is a proper remedy in cases of this character.

The vital question in the controversy is the meaning of the resolution or motion passed at the June 1919 meeting of the Board of Supervisors of Ford county.

Whether we are construing an agreement between parties, a statute, a constitution or a resolution of a Board of Supervisors, the thing we must seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order in which the framers of the instrument have placed them. The instrument must be

[illegible]

[illegible]

[illegible]

construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to construe all its parts in order to determine the meaning of any particular part. Words used in one part of an instrument

are, as a general rule, deemed to have been used in the same sense in another part of the instrument, where there is nothing in the context to indicate otherwise. Chicago Home for Girls vs. Carr, 300 Ill. 478.

The motion in question purports to be a resolution to fix salaries. In its various officers are specified and opposite each in a perpendicular column are figures which in each instance represent the salary of the officer. When expenses or extra clerk hire appear, they do not appear in this perpendicular column, but are carried out on the same line after the salary. The last officer named in the motion is "Superintendent of Schools." Directly opposite, and directly underneath the figures indicating the salaries of the other officers, are the figures "1500" and then after on the same line as in the other cases where an extra allowance is made are the words "and $1500.00, extra compensation." The $ sign does not appear in front of the figures 1500, but does appear at the head of the column.

While it is true that the salary of the County Superintendent of Schools, fixed by statute of 1919 (Chap. 53 Sec. 2 7) at $1500.00, was payable out of the state school fund, and the only authority which the Board of Supervisors had was to allow additional compensation to be paid out of the county treasury, it is evident that they were not aware that it was not necessary for them to specify the amount fixed by the state law in their motion, as the item next above is state's attorney 1700.00," which state's attorney salary was fixed by statute at $1700. Sec. 17, Chap. 53 Smith's Ill. Stats. 1921.

Applying the rule of construction above mentioned to the motion in question we are of the opinion that it was the intention to fix the sum of $1,000 as extra compensation and not the sum of $2,500. Had they intended to fix the latter sum there is no reason why they should not have so fixed in one amount.

The proceedings of the Board of Supervisors in question were set out in full in the petition for mandamus. The petition on its face therefore showed that petitioner was not entitled to the relief sought. In Chaney v. Bak-

er, 302 Ill. 481, it is said: "The rule is that a demurrer searches the whole record and will be carried back to the first substantial defect." The demurrer should have been carried back and sustained to the petition.

Page 4

The judgment is reversed.

Page 5

General No. 7435 Agenda No. 13

April Term A. D. 1922

Nancy C. Hess, Appellant

vs.

George A. Minier, Appellee

Appeal from Pike.

227 I.A. 624

NIEHAUS, P. J.

It appears from the evidence in this case that the appellant Nancy C. Hess rented a safety deposit box from the appellee George R. Minier, who conducted a banking business in the town of Pierce in Pike county; and in conjunction with the business of banking, rented out safety deposit boxes to customers, for the safe keeping of valuable papers. These safety boxes were arranged and located in a vault, which was a concrete structure, with steel doors, and combination lock, and was connected with appellee's banking room. The appellee rented one of the boxes to the appellant; and she placed therein for safe keeping $11,000.00 in Liberty Bonds. These bonds were lost by burglarly, which was committed June 29, 1919. The vault was broken into, and the bonds in question stolen from appellant's box. Afterwards the appellant commenced this suit in the circuit court of Pike county against the appellee, to recover the value of the bonds in question; and alleging, that the appellee was a bailee of the bonds in the vault for hire; and that the vault provided by the appellee was not a safe place for the keeping of her bonds; and that the appellee was negligent in not having provided a safe place. There was a trial by jury, which resulted in a verdict for the appellee. The court rendered judgment on the verdict, and this appeal is prosecuted from the judgment.

The principal errors assigned relate to the introduction of certain evidence by the appellee, and the giving of instructions, claimed to be erroneous. The appellee

over the objection of the appellant, was allowed to testify, that prior to the loss of the bonds in question, he believed that he was furnishing reasonable protection

for the property in the vault. We are of opinion, that appellee's testimony as to his belief, was not competent under the issues; and had a tendency to mislead the jury into thinking that the elements of good faith, was an important or controlling one upon the question of appellee's liability, whereas the controlling factor in appellee's liability was, whether or not, he exercised the care that men of ordinary prudence usually exercise with reference to the safety of their own property. C. & A. R. R. Co. v. Scott 42 Ill. 132. "The appellant was bound to exercise ordinary care and diligence in the preservation of the property entrusted to him by the appellee. Ordinary care in such cases is such care as every prudent man takes of his own goods; and ordinary negligence in the preservation of such goods is such diligence as men of common prudence usually exercise about their own affair." Mayer v. Brensiger 180 Ill. App. 110; National Safe Deposit Co. v. Stead 250 Ill. 584. Evidence was also admitted, concerning burglaries of other vaults and safety deposit places, in other banks. We are of opinion that this evidence was also incompetent, and had a tendency to raise false issues in the case. Concerning the instructions given for appellee, it must be pointed out, that in the first instruction this language is used concerning the effect of the prima facie case made out by the appellant, namely, that "when the defendant introduces other proof which tends to rebut or contradict the evidence introduced by the plaintiff to make out her prima facie case, then such prima facie case vanishes, and it devolves upon the plaintiff to establish her case by a preponderance of all the evidence." Any kind of evidence, no matter how weak or trivial it might be; or how unsatisfactory to the jury, under this instruction would do away with the prima facie case established; the only requirement being that it had a tendency to contradict the presumption arising from appellant's prima facie proof. The

evidence introduced by the appellee to contradict the appellant's prima facie case, must not only have a tendency to do so, but it must be of such a char-

acter and sufficiency, that the proof is at least equal in evidenciary force and effect, to the prima facie case made out. Miles v. International Hotel Co. 289 Ill. 320. The 11th instruction given for appellee, is also objectionable. in that it assumes, that the vault door in question was sufficient to resist some burglar attacks, though not all of them. We are of opinion that the instruction No. 3 requested by the appellant was properly refused, inasmuch as it singled out a certain act of the appellee concerning the keeping of his own bonds, disconnected from the circumstances under which the act was done, and told the jury, that they might consider it on the question of the care which he bestowed on appellant's bonds; it also gave this act of appellee special emphasis and undue prominence. For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

General No. 7438 Agenda No. 10

April Term A. D. 1922

Orion A. Woodson and Sarah M. Carver, Appellees

vs.

Wabash Railway Company, Appellant

Appeal from Scott.

NIEHAUS, P. J.

This is an appeal from a judgment of the circuit court of Scott county upon the verdict of a jury finding the appellant, Wabash Railway Company, guilty of negligence; and assessing damages against it, in the sum of $1754.17; the damages assessed being for injuries to the crops situated on the lands of the appellees, Orion A. Woodson and Sarah M. Carver, and are alleged to have resulted from the overflow waters of Wolf Run Creek, a water course running across the right of way of the appellant and under a bridge known and designated as 277 A. It is averred in the declaration, 'that about the year 1888, the railway company, then owning and operating the railroad line in question, caused the bridge 277 A to be built; and by the consent and agreement, or acquiescence of the railway company, then operating said line, in the year 1889, Wolf Run Creek was diverted from the course in which it then flowed, and turned in a northerly direction over and across the right of way of the Keokuk division of said railway line, under said bridge 277 A; and that said stream has ever since uninterruptedly and continuously flowed over and across railway company's right of way, at that point and to bridge 277 A, with the acquiescence of the railroad company in control of the railroad.' It appears from the evidence, that bridge 277 A was bnilt in 1888 by a railroad company, which was the A was built in 1888 by a railroad company, which was the an agreement which it made with the commissioners of the Scott County Levee & Drainage District; and that this agreement was in writing; and that the construction of the bridge was made in accordance with the written agreement; and that the waters of

Wolf Run Creek, were thereupon diverted from their natural course, and turned to run down through the present channel, under the bridge in question. Under this state of the proof, it is evident, that the liability of the appellant under the obligations which were assumed in the building of the bridge and to take care of the diverted waters or Wolf Run Creek, depend upon the terms of the written contract referred to. No writing or writings, containing the agreement, were introduced in evidence; and there is no evidence to show what the agreement was, nor of its terms and conditions; nor of the obligations which the railroad company assumed thereby. In the absence of any proof, it cannot be presumed that the appellant under the agreement had any obligation or duty concerning the taking care of the waters of the stream in question. which are alleged in the declaration. And to entitle the appellee to recover it must affirmatively appear in evidence that the railroad company assumed the duties and obligations concerning bridge 277 A which are alleged in the declaration. For the reasons stated, the proof in the record is insufficient to show that appellant was guilty of negligence. Judgment is therefore reversed and the cause remanded.

Reversed and remanded.

(27)

Opinions filed Oct 24 1922

General No. 7441 Agenda No. 19

April Term A. D. 1922

Homer English, Trustee in Bankruptcy, Plaintiff in Error

vs.

T. F. Grady, Defendant in Error

Appeal from McLean.

227 I.A. 625

NIEHAUS, P. J.

This suit in assumpsit was commenced in the circuit court of McLean county by George Weinzierl, to recover the price of 1941 bushels of yellow corn, which he claims to have sold to the appellee, T. F. Grady, the owner of a grain elevator at Downs. After this suit had been commenced, the appellant Homer English as trustee in bankruptcy for Weinsierl, was substituted as plaintiff in the suit. There was a trial by jury and a verdict and judgment for the appellee; this appeal is prosecuted from the judgment.

It was the contention of the appellee in defense of appellant's claim that he did not purchase the corn referred to; but that it had been received in his elevator, and held therein, for shipment for Weinzierl to Peoria or some other market; and subject to the directions to be given by Weinzierl; and that he never received any orders from Weinzierl to ship the corn; and that hence the corn, or corn of like quantity and quality, remained in his elevator subject to the order of Weinzierl. The evidence concerning this transaction is confined to the testimony of Weinzierl and appellee's agent, Robert A. Hoover, who was in charge of the elevator at Downs; and who transacted the business for the appellee. These parties flatly contradict each other upon the material points testified about. In order to determine whether or not there was a sale of the corn, as claimed by Weinzierl, it was necessary for the jury to pass upon the respective credibility of these two witnesses. Hoover testified that he took the 1941 bushels of corn from Weinzierl merely for the present; and subject to his order; and that he had corn of the same quality and

amount in the elevator at all

times after that; and until March 1st, 1921 the year following. In rebuttal of this testimony, the appellant called Robert Price, a former employe of the appellee, as a witness; and offered to prove, that Price was in the employe of the appellee, during the month of January 1921: and that, at that time, he swept every bin in the elevator; and that the same was clear of corn; and that there was no corn in the west elevator; and less than 500 bushels in the east elevator. The introduction of this evidence was objected to by the appellee; and on his objection ruled out. This ruling of the court is assigned as error. We are of opinion, that the evidence was competent rebuttal; and it should have been submitted to the consideration of the jury; it had a material bearing on the issue involved; and it was an important circumstance which the jury might have considered, upon the question of whether appellant or appellee's version of the contract made was the correct one; also upon the matter of the credibility of the two witnesses referred to. For the error indicated, the judgment is reversed and cause remanded.

Reversed and remanded.

Opinion filed Oct 25, 1922

Petition denied Dec 19, 1922

General No. 7446 Agenda No. 49

October Term, A. D. 1921

Town of Windsor, Shelby County, Illinois, Appellant

vs.

Charles W. Wittenberg, Appellee

Appeal from Shelby.

NIEHAUS, P. J.

This action was brought in the name of the appellant Town of Windsor, against the appellee Charles W. Wittenberg, for the recovery of the penalty provided for by statute, for obstructing a public highway. On the first trial, before a justice of the peace, appellee was found not guilty. An appeal was thereupon prosecuted to the circuit court, where another trial also resulted in a verdict of not guilty. And the court rendered judgment on the verdict, and an appeal is prosecuted from the judgment.

It is insisted by the appellant, that the evidence clearly shows, that the appellee set out his line fence into a public highway, which had been legally dedicated for public use, and in such a way, as to take in a strip of land having an average width of about six feet and ten inches; and knowing that he had no legal right to do so. Whether the strip in question was a part of the dedicated highway, was a controverted matter in the case, and a question of fact for the jury to determine. Town of Harmnoy v. Clarke 250 Ill. 57. Two juries determined this question against appellant. We cannot say, that the finding of the last jury is manifestly against the weight of the evidence. It is assigned as error, that the trial court allowed the appellee to testify, that before he built his fence, he had a telephone conversation with the county superintendent of highways; and with the town clerk concerning the line of the road. We are of opinion that this evidence was not competent; and was of no evidenciary value or force, upon the question at issue, namely, where the actual line of the road was; but, we do not regard the error either as important or prejudicial; and it cannot therefore be considered as a

proper basis to reverse

the judgment. Appellant also complains because this action was designated in some of the instructions as a quasi criminal proceeding. This was not error. Underwood v. Ankrum 190 Ill. 365. Nor did the court err in instructing the jury that the proof should show the appellee's guilt by a clear preponderance of the evidence. A. T. & Santa Fe Ry Co. v. People 227 Ill. 270; Ruth v. City of Abingdon 80 Ill. 418; Gilbert v. Bone 79 Ill. 341; T. P. & W. Ry. Co. v. Foster 43 Ill. 480. We find no reversible error in the record, and judgment is therefore affirmed.

Judgment affirmed.

General No. 7454 Agenda No. 28

April Term A. D. 1922

Marian Myser, an infant, by May Myser, her father and next friend, Appellee

vs.

Central Illinois Public Service Company, a Corporation, Appellant

Appeal from Douglas.

NIEHAUS, P. J.

This is a suit commenced by the appellee, Marian Myser, an infant about nine years old, by Max Mayser, her father and next friend, in the circuit court of Douglas county, against the appellant, Central Illinois Public Service Company, to recover damages alleged to have been sustained by her from injuries received, in consequence of an alleged negligence on the part of the appellant. There is no controversy about the manner in which the appellee was injured. On or about the 27th day of July, 1921, she was walking on the sidewalk along the street in front of the First National Bank building in the village of Villa Grove; the bank buiding being situated on the northwest corner of Main and Monroe streets in the village. The bank entrance had a stone ornament which suddenly fell from its position, and struck the appellee on the head, causing the injuries of which she complains.

The evidence shows, that in providing for an additional electric lighting, which was thought necessary for the band concerts in the village, a contrivance was devised; and in order to hold this contrivance in place, guy wires were used, one of which had been fastened to the stone ornament referred to. At the time of the injury, it is alleged, that the appellant by its servants were at work on this lighting contrivance, and in the course of the work, and in consequence of the strain put upon the guy wire thereby, the stone ornament was pulled off, and thereby caused it to fall upon the appellee. The main contested question

in the case is, whether Paul

Knox, who was in the employ of the appellant; and by whose assistance, and supervision it is claimed, the lighting contrivance was put in place, was acting for the appellant in his capacity as superintendent or maintenance man, and within the scope of his employment as such, or was merely acting on his personal responsibility and individual initiative. There was a trial by jury, which resulted in a verdict in favor of the appellee fixing her damages at $3500.00 The appellant moved for a new trial, whereupon the appellee entered a remittitur of $1500.00; and the court thereupon denied the motion and entered judgment for $2000.00 against the appellant, from which an appeal is prosecuted. It is contended by the appellant, that hearsay evidence was introduced to show what position Paul Knox was holding in the appellant's service. Evidence was introduced to show, what was generally understood in the neighborhood to be his connection with the appellant company. It is clear that this evidence was not competent; and the objection to it, should have been sustained; the nature and character of Knox's employment was one of the important and contested questions in the case; and it was necessary that it should be proven by competent evidence. Complaint is also made about the giving of the third instruction for the appellee. This instruction is erroneous, in that it assumes that Knox was agent or servant of the appellant, and that in assisting in the work of attaching and fastening the electric lighting fixture in question, he was acting for the appellant, and within the line and scope of his employment; and not on his individual initiative and responsibility. The instruction directs a verdict, and must therefore be regarded as reversible error.

For the reasons stated, judgment is reversed and the cause remanded.

General No. 7463 Agenda No. 37

April Term A. D. 1922

Marie L. Hacke, Appellant

vs.

Charles Griffel, et al., Appellees.

Appeal from Macoupin.

NIEHAUS, P. J.

The appellant Marie Hacke commenced this suit in assumpsit in the circuit court of Macoupin County, to recover from Charles Griffel, William Griffel and John Griffel, appellees, the amount realized by the appellees, from the sale of coal underlying certain lands, which the appellant had previously conveyed to them; which amounted to thirty four acres and a fraction. Her claim was based on alleged understanding and agreement which she claims to have had with the appellees at the time the conveyance was made; and to the effect, that whatever they realized from a subsequent sale of the coal, in the part conveyed by her, should be paid over to her as a part of the consideration for the conveyance. All the appellees, in the testimony given by them, deny, that any such agreement had been made with the appellant; but that the amount paid to the appellant for the conveyance, was the entire purchase price and consideration for the land conveyed; and that no reservation was made, obligating them to pay anything additional to her. There was a trial by the court; and the court found the issues for the appellees; and entered a judgment in bar of appellant's suit; this appeal is prosecuted from the judgment.

It is contended by the appellant, that the finding of the court is against the weight of the evidence; and this is the only question presented for consideration on this appeal. It was necessary for appellant to prove her contention by a preponderence of the evidence, to entitle her to recover. The Court in deter-

mining the matter of the preponderance of the evidence in this case had to pass on the credibility of the witnesses. If the testimony

of the appellees is to be taken as true, it is clear, that the appellant had no ground of recovery; and the trial court must have reached the conclusion that the appellee's version given of the transaction between the parties was the true one; and therefore rendered judgment accordingly. Where issues are tried by the court, the findings of the court on facts, have the same force and effect as a verdict of a jury; and are therefore usually regarded as conclusive where there is evidence to sustain them; especially where there is a conflict in the evidence concerning the facts necessary to a recovery. And the findings of a court on questions of fact, should not be disturbed on review, unless they are manifestly against the weight of the evidence. Berghofer v. Frazier 150 Ill. 577; Holt v. Simpson 230 Ill. 170; People v. Askins 200 Ill. App. 621; H. S. B. & Co. v. Mill Co. 152 Ill. App. 479; Chikora v. Platzke 151 Ill. App. 280. We are of opinion, that the finding of the court was fully warranted by the evidence; and therefore this court would not be justified reversing the judgment on the ground that it is manifestly against the weight of the evidence. Judgment is affirmed.

Affirmed.

Opinion filed Oct 25, 1922

(27) (8 2)

General No. 7468 Agenda No. 40

April Term A. D. 1922

G. W. Ludwick, Plaintiff and Appellee

vs.

Helen Deutsch, Defendant and Appellant

Appeal from Vermilion.

NIEHAUS, P. J.

This action was brought by the appellee G. W. Ludwick in the circuit court of Vermilion county, against the appellant Helen Deutsch, to recover damages alleged to have resulted to appellee, in consequence of the negligence of the appellant; which negligence it is claimed, brought about a collision of the appellant's automobile with that of the appellee. There was a trial by jury which resulted in a verdict and judgment against the appellant for $415.00; and this appeal is prosecuted from the judgment.

It is insisted on appeal, that the court erred in refusing to direct a verdict for the appellant. It is sufficient to say, concerning this contention, that the court properly refused to do so, because there was evidence adduced on the trial tending to show the negligence alleged. But the proof concerning the damages sustained by the appellee is clearly insufficient to satisfy the legal requirements. The evidence does not show the extent of the injury to appellant's car; nor what particular parts of the car had been broken by the collision; nor the necessity of substituting any new parts; nor the extent and cost of the repairs which were made necessary on account of the collision. The only instruction given for appellee which directs the jury's attention to the amount of admages he was entitled to is as follows:

> The court instructs the jury that it is not necessary for the plaintiff to prove the charges contained in each count of the declaration in order to entitle him to recover in this case. If the plaintiff proves the charges contained in any one of the counts, by the preponderance of the evidence, he will be entitled to a verdict for such an amount as the preponderance of the

> evidence shows that he is entitled to, not to exceed the amount claimed in the declaration.

This instruction does not correctly state the measure of damages. The true measure of damages in this case is the cost of repairs necessary to put the car in substantially as good condition as it was before the collision. T. P. & W. Ry. Co. v. Roberts 71 Ill. 540; Coyne v. C. C. C. & St. L. 208 Ill. App. 125; Walton v. B. B. & C. R. R. Co. (Opinion by this Court filed April Term 1921). We find no error in the giving of appellee's instruction No. 4, nor in the refusal of Instructions requested by the appellant numbered 15, 16 and 17; but for the error indicated, judgment is reversed and cause remanded.

Reversed and remanded.

General No. 7474 Agenda No. 55

April Term A. D. 1922

Peyton E. Kries, Appellant

vs.

W. W. Hughes, Appellee

Appeal from Sangamon.

NIEHAUS, P. J.

The appellant Peyton E. Kreis took judgment in the circuit court of Sangamon County for $1227.64 against W. W. Hughes the appellee, on a judgment note, made by appellee. At the succeeding term of the court, on motion of the appellee, the judgment was opened up, and the appellee was allowed to plead in defense of appellant's claim. He pleaded the general issue, and two special pleas; one alleging that the consideration for the note was an illegal one; another that the note was given for money won by the appellant from the appellee in speculation on the market price of grain; the other plea averred, that the note was made without any good or valuable consideration. Issue was joined on matters set up in defense. There was a trial by jury, which resulted in a verdict for the appellee, upon which a judgment in bar was rendered; and from this judgment an appeal is prosecuted.

The vital question in this controversy, is whether the buying and selling of grain, which was involved in the transactions between the parties, and in the pecuniary settlement for which the note was given, were a violation of Section 130 of Chapter 38 Revised Statutes. This Section provides that

"Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, where it is at the time of making such contract intended by both parties thereto that the option, whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof, or whoever forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of

such commodities, shall be fined not less than

$10 or more than $1,000 or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

It will be noticed that under the above section, the intention of the parties to a contract concerning the delivery of the grain purchased, is one of the controlling factors in giving character to the transaction, either as a contract for gambling, or a legitimate contract for the purchase and sale of grain; and this feature has also been emphasized by Supreme and Appellate Courts in Pelouze v. Slaughter 241 Ill. 215; Pixley v. Boynton 79 Ill. App. 351; Dillon v. McCray 59 Ill. App. 505; Ennis v. Edgar 154 Ill. App. 544; Barnett v. Baxter 64 Ill. App. 544.

To make purchases and sales of grain, such as are here involved, gambling transactions, it must appear that neither party intended actual purchases and sales to be made, but that both had the intention of settling on the differences in price only. Kertling v. Sturtevant 181 Ill. App. 517. And the burden of proof to show that the contracts for purchase and sale of grain were in fact gambling transactions, rests upon the party who asserts the fact. Johnson v. Milmine 150 Ill. App. 208. It was a question of fact for the jury to decide, whether it was the intention of both parties to the contracts involved, that the options whenever exercised, or the contracts resulting therefrom, should be settled, not by the receipt or delivery of grain, but by the payment of the differences in the prices. This being the legal status of the controversy, we are of opinion, that the giving of the second instruction for appellee was erroneous. This instruction, which apparently aims to follow the statute in defining a gambling contract, omitted the important element of the intention of the parties, found in the statutory definition. The omission eliminated from the consideration of the jury an element which they should have considered in order to arrive at a correct conclusion concerning the legality of the transactions. It is true this omission does not appear in other instructions, which

were given; but inasmuch as the instruction referred to directs a verdict and is misleading concerning an import-

ant legal element in the controversy, it constitutes reversible error. Judgment is therefore reversed and cause remanded.

Reversed and remanded.

General No. 7440 Agenda No. 13

April Term A. D. 1922

Paul Murray, Admr, etc., Defendant in Error

vs.

Standard Pecan Co. (a corporation), Plaintiff in Error.

Appeal from McLean

227 I. A. 583

HEARD, J.

This cause was before the court at a prior term and was then reversed and therefore amended. (Murray vs. Standard Pecan Company 217 Ill. App. 587.) A second trial was had upon a stipulation of facts before the court and judgment entered for defendants in error hereinafter called the plaintiff, against plaintiff in error hereinafter called defendant. To review that judgment this writ of error is prosecuted.

The undisputed facts are that R. M. Nicholson was on September 12, 1912, a sales agent of defendant, a corporation, authorized to sell its stock for cash at the rate of ten dollars per share; that certain certificates of stock signed by the President and Secretary of defendant company, with corporate seal affixed, were delivered to Nicholson in blank, with authority to fill in said blanks, in case of sale, with the name of the purchaser, the number of shares sold, and the date of the sale; that Nicholson had been given no authority whatever to sell said shares of stock with agreement or contract attached providing for the repurchase of said stock by defendant; that said Nicholson did on September 12, 1912, sell to Mrs. A. G. Murray, plaintiff's intestate, one hundred shares "Class B Cumulative Preferred" stock of defendant at the price of ten dollars per share; that without the knowledge or consent of defendant and without afterwards reporting the same to plaintiff Nicholson wrote upon the back of said certificate the following: "It is hereby agreed that the Standard Pecan Co., shall at the end of three years from date repurchase this stock at $11.00 per share upon thirty days notice. The owner does not need to sell said Company the stock unless she

so desires. (Signed) Standard Pecan Co. per R. M. Nicholson;" that said Nicholson delivered said certificate

so endorsed by him to Plaintiff's intestate, the purchaser and collected from her one thousand dollars for said stock which he paid over to defendant; that Nicholson. also before delivering said stock to the purchaser filled out the blanks properly with the date of issue, name of the purchaser, number of shares, etc; that defendant never knew that said certificate had any endorsement thereon relating to repurchase thereof until after the death of the purchaser and until after three years from the date of the certificate when its secretary received by mail a notice signed by the heirs of the purchaser, stating in substance that they were giving thirty days notice in writing of their election to resell to it the said shares of stock in accordance with the terms of the writing on the back of the certificate, and demanding a repurchase by it of said stock at eleven dollars per share at the expiration of said thirty days; that immediately upon the receipt of said notice defendant by its proper officers replied thereto advising the heirs that it would not repurchase said stock, and that the agent who sold the same had no authority to make any agreement with the purchaser that the Company would repurchase said stock and that it repudiated any such agreement to repurchase; that defendant has not repaid Mrs. A. G. Murray, nor to her legal representatives, etc., any part of the purchase money paid for said stock; that there was paid to her two dividends on the stock.

Defendant contends that upon the stipulated facts the plaintiff cannot legally recover anything from it in this suit;

1. Because having received the purchase price of its stock under an authorized sale by its agent, whose authority was limited to the sale of its stock, it is neither required to perform under the agent's unauthorized agreement to repurchase the stock, nor to refund the purchase price upon its repudiation of the unauthorized agreement to repurchase.

2. Because the endorsement on the back of the certificate

written there by the agent outside of his

authority, as agent, was an independent agreement, and no part of the certificate which the agent was authorized to sell.

3. Because the unauthorized endorsement by defendant's agent of an agreement to repurchase, written by the agent on the back of the certificate did not make the sale conditional.

4. Because plaintiff's intestate in dealing with defendant's was bound in law at her peril to ascertain the scope and extent of the agent's authority at the time sne dealt with him and was bound in law to inquire into the agent's authority, in addition to the sale of the stock.

When this case was before this court at a prior term on substantially the same statement of facts this court said:

"The purchase made by decedent, and for which tne money was paid, was a certificate of stock with a purported agreement by appellee to repurchase it endorsed thereon. If such endorsement is not valid on account of want of authority on the part of appellee's agent to make it, then the whole contract fails for the reason that apepllant's intestate was a party to no contract of which the endorsement was not a part. * * * * Eberts vs. Selover, 44 Mich. 519. The contract in question consisted of that which appears on the face and back of a certificate of stock, which taken together constitute a conditional sale. (Roush vs. Illinois Oil Co. 180 Ill. App. 346) and appellee cannot separate the parts and ratify one, and thereby make it an absolute sale enuring to its benefit and repudiate the remainder. (Taylor vs. Conner, 41 Miss. 722; Sternbach vs. Leopold, 50 Ill. App. 476)"

The Circuit Court in its findings followed the rule that laid down and the judgment should therefore be affirmed.

General No. 7445 Agenda No. 54

April Term A. D. 1922

Flora M. Nelson, Appellee

vs.

Richard Elmer Nelson, Appellant

Appeal from Hancock.

HEARD, J.

On October 8, 1918, appellee brought suit for seperate maintenance against appellant in the circuit court of Hancock County. Appellant in his answer to the bill of complaint denied that appellee was his wife and alleged that at the time of the purported marriage of appellee and appellant, appellee was the wife of one Robert Jones. The answer also denied that appellee was living separate and apart from him by reason of his fault. Appellant also filed a cross bill asking for an annulment of the purported marriage alleging that she was the wife of Jones at the time of his purported marriage with her.

After hearing, the court entered a decree dismissing the cross bill and requiring appellant to pay $100.00 per month as alimony to appellee and $1500.00 for her solicitor's fees, together with costs of suit, from which decree this appeal is prosecuted.

Three questions are presented for our consideration. Was Fora M. Nelson, the wife of said Richard Elmer Nelson, under the purported solemnization of marriage with him, or was she at that time still the wife of one Robert Jones, and incapable of contracting marriage with said Richard Elmer Nelson? Was there a valid decree of divorce between Flora Jones and Robert Jones?

Was she at the time of filing her said Bill for separate maintenance, living separate and apart from him, the said Richard Elmer Nelson, without her fault?

The facts as disclosed by the record are that appellee on June 14, 1899, was lawfully married to Robert Jones and that she lived with him until about April 25, 1907, in Kentucky; that afterwards she came to McDonough County, Illinois, and became a resident there, and on August 6, 1909, filed a bill for divorce against said

Robert Jones;

that at the time said Robert Jones was a non-resident of the State of Illinois; that she never obtained a divorce from Robert Jones, or attempted to, except by said suit in the Circuit Court of McDonough County, Illinois.

In her said suit for divorce, appellee filed with the bill an affidavit of non-residence showing that said Robert Jones was a non-resident of Illinois and that process could not be had upon him and giving his place of residence as Louisville, Kentucky. A publication of a non-resident notice was made in the Macomb Bystander, a daily newspaper printed at Macomb in said McDonough County, Illinois. A publisher's certificate which was filed in said cause on August 11, 1909, shows that the non-resident notice was published "for three successive weeks, the first insertion of which was in the issue of said paper bearing date August 7, 1909, and the last insertion in the issue of same bearing date August 21, 1909," while another publisher's certificate filed Auguse 27, 1909 shows publication for " four successive weeks, the first insertion being August 7, 1909 and the latest August 28, 1909." Each of the certificates being filed at a time prior to the last publication date mentioned therein.

The decree in the case was in part as follows:—"And the court having examined the affidavit of non-residence filed herein and the certificate of publication of notice to the defendant Robert Jones, and being thereby and otherwise fully advised in the premises, finds * * * that thereupon publication notice to the said defendant, Robert Jones, was made in the Macomb Bystander, a daily secular newspaper, of general circulation in the County of McDonough, State of Illinois, in which said suit was brought, published in the City of Macomb, County of McDonough and State of Illinois, which said newspaper has been regularly published in the said City and County aforesaid, for more than six months prior to the first publication of said notice, which said notice contained a statement of the pendency of this suit, the names of the parties hereof, the title of the court and the time and place of the return of summons herein, the first pub-

lication of which notice was made in an isssue of said paper dated the 7th day of August A. D. 1909

and the last publication of said notice was made in the issue of said paper dated the 21st day of August, A. D. 1909; and which said notice was published in said paper for three successive weeks, the first publication being more than forty days prior to the first day of the present term of this court, and it further appearing to the court that the clerk of this court did within ten days after the first publication of said notice, mail, postage prepaid, a copy of said notice to the said defendant, Robert Jones, at this post office address aforesaid; and the court being fully advised in the premises finds that this court now has jurisdiction of the person of the said defendant, Robert Jones, and of the subject matter of this suit; and the said defendant, Robert Jones, having been three times solemnly called in open court to appear, except, demur, plead or answer, the complainant's bill, came not nor anyone for him, but herein made default."

It is contended by appellant that the Circuit Court erred in not finding that the purported decree of divorce entered in the suit of Flora Jones v. Robert Jones was a nullity and that the Court did not have jurisdiction over the person of said Robert Jones, and that said purported decree did not constitute a divorce, and the greater portion of appellant's 102 page brief and argument and his 37 page reply brief is devoted to a discussion of this question.

It has frequently been said by the Supreme Court that there probably is no word in common use which is more often incorrectly used by writers of Judicial opinions than the word Jurisdiction.

By statute the circuit court is given authority to hear and determine divorce cases and had jurisdiction over the general class of cases to which the Jones case belonged. When appellee who was a resident of the County, filed her bill of complaint in the Circuit Court of McDonough County, filed her affidavit of non-residence, caused publication to be made in a newspaper within

three or four weeks, appeared in open court, and caused the defendant to be defaulted, submitted herself to the jurisdiction of the court and when she procured the court to grant her a decree of

divorce and Robert Jones relying upon the legality of the divorce remarried, the decree of divorce as to appellee, no matter how erroneous, so long as it was not reversed in a direct proceeding, was not a nullity as to appellee, and she, having lead the court into error, (if there was error) could not take advantage of her own wrong and have the decree set aside or vacated. Guggenheim v. Guggenheim 189 Ill. App. 146; Sloan v. Sloan 102 Ill. 581.

The court in the Jones decree found "that this court now has jurisdiction of the person of the said Robert Jones and of the subject matter of this suit."

Any rule adopted in this regard must be a general rule and to hold that a husband who has married a woman who had obtained a decree of divorce, which she herself could not have annulled or set aside, after living with her for years and begetting children, could, by the sanction of a court, have a decree, to which he was a stranger, declared a nullity, his children bastardized and his wife thrown upon the mercies of the world, would be abhorrent to our conception of justice and a blot upon our jurisprudence.

It is contended by appellant that the evidence does not show that appellee was living separate and apart from appellant without fault on her part. The evidence is quite voluminous and it is usual in such cases it is very contradictory. No good purpose would be conserved by reviewing this evidence in detail, Suffice it to say, that appellee testified her husband beat her with his fist, choked her and was guilty of divers other acts of cruelty, which if true, fully justified her in leaving appellant. The court who saw and heard the witnesses has found this question of fact in her favor and, although these acts are denied by defendant and his witnesses, we would not be justified in disturbing the finding.

The decree is affirmed.

General No. 7449 Agenda No. 24

April Term A. D. 1922

Bert Robertson and Chas. A. Smith, Appellees

vs.

Farmers Elevator Company of Homer, Illinois, Appellant

Appeal from Champaign.

HEARD, J.

227 I.A. 665

This was an action in assumpsit, brought by the appellees against the appellant, claiming the purchase price of certain oats grown in the year 1920 on land owned by one Josephus Yount, and sold by one Alex McElroy to the appellant. The declaration consists of the common counts only, to which the appellant pleaded the general issue.

On May 4, 1920 appellees took a chattel mortgage from McElroy which purported to cover, among other things, a one-half interest in sixty-five acres of growing oats, growing on the Yount farm in Sections 2 and 3, Township 18 North, Range 14, West, in Vermilion county The mortgage was properly acknowledged and recorded in Vermilion County.

Alex McElroy had been a tenant of one Josephus Yount, under a written lease dated February 12, 1920, whereby Yount leased to McElroy certain lands situated in Vermilion County in Section 2, 3, 10, and 11 of Township 18 North, Range 14 West, for grain and cash rent. On the back of this written lease appeared a written endorsement dated March 1, 1920, whereby McElroy, for certain considerations therein named, assigned and transferred to Yount all his rights under the lease and all his interests in the grain grown or to be grown on said land. This written assignment the court refused to admit in evidence.

There was evidence tending to show that the night before July 16, 1920, McElroy had a conversation over the telephone with the

appellee Smith in which Smith authorized McElroy to make sale of the oats in question. McElroy then made inquiries of grain buyers in Homer,

Illinois, including the appellant, as to what price they were paying for oats, and on July 16, 1920, the appellant company having offered the highest price, McElroy sold the oats in question to appellant. The place of business of the appellant was in Homer, which is in Champaign County, Illinois, a different County from that in which the oats were growing, and the mortgage recorded.

Upon the sale being made and prior to the delivery of the oats, appellant advanced to McElroy $30.00, upon this sale. The oats in question amounted to about $867.00, and were delivered to the appellant at Homer, about August 2, 1920, and settlement for the same made with McElroy. At the time of the settlement there were present McElroy, Josephus Yount, the owner of the land, and the witness Byers, who was the manager of the appellant company. At this settlement the appellant paid to Yount, the landlord, out of the proceeds of the oats, $200.00 due Yount for rent under his lease with McElroy.

The appellant's agents with whom the business was transacted testified that they never had any knowledge or information that appellees had a chattel mortgage on these oats, or had any claims thereto until after sale, delivery and settlement for the oats in question. The appellee Smith testified that early in the summer of 1920, he told the company's manager, Byers, that they held a chattel mortgage on the grain, and that McElroy was going to deliver the oats either to appellant or to some other elevator, and that appellees wanted the money for the oats paid to them. Byers absolutely denied ever having had any such conversation.

The appellees made no demand on appellant for the oats in question. After the settlement was made by the elevator company, appellees demanded that they be paid the amount of the purchase price of the oats, and upon this being refused, brought this suit, declaring under the common counts only upon the theory that claiming to have a chattel mortgage they were entitled to recover from the company the amount which the company had contracted to pay McElroy

as the purchase price of the oats.

Both at the close of the evidence for the plaintiff and at the close of all of the evidence in the case, appellant moved to exclude the evidence and to instruct the jury to find for the defendant. Both of these motions were denied by the court.

The claim of the appellees was for the entire amount of the purchase price of these oats without allowing any deduction for rent paid the landlord or anything else; and amounted to ~~$801.56~~ 604.56. The verdict of the jury was for the entire amount of appellee's claim ~~$804.67~~. ~~$~~604.67

Motion for a new trial was made by appellant, and overruled by the court, and judgment entered in favor of the appellees and against the appellant for ~~$804.67~~ $604.67 and costs, from which judgment this appeal was taken.

It is contended by appellant that the court erred in not instructing the jury to find the issue for the defendant. Appellees claim that the evidence shows appellant to be indebted to them and that such indebtedness can be recovered under the common count for money had and received and while many authorities are cited in an attempt to sustain this contention, an examination of these authorities fails, however, to show any holding that assumpsit for money had and received is a proper remedy. Appellant received no money which in equity and good conscience belonged to appellees. It only purchased in the open market property in which appellees had only a special interest. In such case the mortgagor cannot recover from the purchaser the purchase price of the property, but can only recover the property in an action of replevin, or recover in an action of conversion to the extent of his special interest and he can not recover from the purchaser beyond his specail interest in the property. Bailey vs. Godfry 54 Ill. 507; Howard v. Burns 44 Kan. 543; Bank of Commerce v. Morris, 114 Mo. 255.

The court should therefore have sustained appellants motion to instruct the jury to find the issues for appellant.

Accordingly the judgment of the circuit court is reversed and judgment entered here for defendant in bar of the action and for costs.

General No. 7456 Agenda No. 30

April Term A. D. 1922

Elmer F. Stark, Administrator of the Etsate of James Lowell Lewis, deceased, Appellee

vs.

Coles County Telephone and Telegraph Company, a Corporation, and Central Illinois Public Service Company, a corporation, Appellant

Appeal from Coles.

HEARD, J.

This is an action of case brought by appellee, as administrator of the estate of James Lowell Lewis, for the wrongful death of Lewis, alleged to have been caused by the joint negligence of the appellant, and the Coles County Telephone and Telegraph Co., originally brought against both but later dismissed as to the telephone company.

The declaration charged the appellant with operating an electric transmission line through the alley in which the deceased lost his life; that at one point in that alley there was a crossing of two telephone wires with the lines of appellee, the telephone wires being above the electric wires; that the electric wires were carrying a high and deadly voltage of electricity, and that the insulation on the wires carrying this electricity had become rotten and decayed and had fallen off in many places. The declaration in different counts sets out various alleged acts of negligence and alleges that as a result thereof a telephone wire fell across the wires of appellant and as a result of faulty insulation thereon, became charged with a deadly current of electricity; that said telephone wire, so charged, hung in said alley, and that James Lowell Lewis, a pedestrian lawfully using said alley, and in the exercise of due care and caution for his own safety, came in contact with said wire and received a charge of electricity which

killed him.

The trial of the cause resulted in a judgment for $7916 in favor of appellee against appellant from which

judgment the appeal has been taken.

Appellant interposed a challenge to array of Jurors on the ground that the Jury list had not been prepared by the Board of Supervisors in accordance with the provisions of the statute relating thereto. As the judgment must be reversed upon other grounds and before the cause can be tried another jury list will have been prepared it is unnecessary for us to discuss this point.

Appellant contends that the court erred in the giving of instructions to the Jury. Modified instruction, No. one is erroneous in not confining the consideration of the Jury to the negligence of the defendant alleged in the declaration or some count thereof and in not informing the Jury what negligence was charged in the declaration. Modified instruction No. 2 is defective in not confining the consideration of the Jury to pecuniary damages. Modified instruction No. 3 is erroneous as it assumes that appellant was negligent and only submits to the Jury the question as to whether or not such negligence was the proximate cause of the death of Lewis.

As the record in this case was made the court did not err in excluding evidence of the alleged settlement of appellee with the telephone company. The competency of evidence to go to the Jury is a question for the court and it would have been proper for appellant to have examined witnesses as to the terms of the alleged settlement out of the presence of the Jury for the purpose of determining the competency. If the telephone company paid money for a covenant not to sue then evidence as to the amount paid was clearly incompetent.

For the error in giving instructions the judgment is reversed and the cause remanded.

General No. 7469 Agenda No. 51

April Term A. D. 1922

Thomas Oseland, Appellee

vs.

Wabash Railway Company, Appellant

Appeal from Christian.

HEARD, J.

This is an action on the case for damages for personal injuries sustained by appellee, Thomas Oseland, because of the alleged negligence of the appellant, Wabash Railway Company, on the 13th day of May, 1920, by the plaintiff falling into a hole in the side walk at the intersection of a public street of the village of Stonington and appellant's right of way. The trial of the cause resulted in a judgment for $1575.00 and costs in favor of appellee from which judgment this appeal has been taken.

The amended declaration contained three counts making the allegations usual in similar cases.

To this declaration a plea of the general issue was filed and a special plea that the plaintiff was barred from his action because at the time the said street was laid out by the Village of Stonington over the right of way of the defendant company, the said defendant and the said Village of Stonington entered into a written contract which was set forth in the plea, that in consideration that the Village of Stonington desired to open the said street over the right of way of said railroad company, that the said Village would pay to the said defendant the sum of $12.50, being the cost of placing the side walk between the tracks of the defendant, and that the said village would construct and forever maintain the approaches to said tracks and all necessary side walks upon said street over said railroad property; also that said Village agreed to abandon proceedings for the opening of another street for the period of five years and until the necessity of said village had become greater; that in consideration thereof the defendant company granted to the village a right of way over the said tracks to be kept open and maintained as a thoroughfare, which contract

remaining

in full force and effect relieved the defendant from maintaining or keeping in repair the said approaches to the said crossing; and that by reason thereof defendant was not liable for failing so to do.

To this plea a demurrer was sustained. Appellant stood by its special plea and contends that the court erred in sustaining the demurrer.

Section 62, Chapter 114 of Smiths Revised Statute of Illinois, provides: "Hereafter at all of the railroad crossings of highways and streets in the State the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto, within their respective right of way, so that at all times they shall be safe as to persons and property."

In Illinois Central Railroad vs. Stuart, 130 Ill. App. 197, it was said: "The statute, in expressed terms, imposes the duty upon the railroad corporations to construct and maintain at all railroad crossings of highways and streets in this state, crossings and approaches thereto within their respective rights of way of such railroad corporations so that at all times such crossings and the approaches thereto shall be safe as to persons and property. This duty so imposed upon railroad corporations cannot be delegated by them so as to enable them to escape liability to a person injured where there has been a failure to perform such duty."

The contract in question was only between appellant and the Village of Stonington and in no way affected the rights of appellee as against either party. The demurrer was properly sustained.

At the request of appellee the court instructed the jury as follows:—

1. "The court instructs the jury that under the statute it is the duty of the defendant to construct and maintain crossings and approaches thereto at highways and streets in this state within its right of way so that at all times they shall be safe as to persons and property."

2. "The court instructs the jury that it is the duty of the defendant to construct and maintain crossings and approaches thereto

upon the streets and highways

within its respective right of way so that at all times they should be safe as to persons and property, and if you believe from the evidence that the crossing in question was upon the right of way of the defendant, and that it failed to use reasonable care to construct and maintain said crossing and the approaches thereto so as it would be safe as to the persons and property, and as a result thereof, the plaintiff while passing over the same, exercising due care and caution for his own safety, if the evidence shows he was exercising due care for his own safety, was thrown to the ground and injured and sustained damage as a result thereof, then you should find the issues for the plaintiff and assess his damages in such an amount as you believe under the evidence he is entitled to."

Appellant contends that railroad companies are not insurers of the safety of their crossing, but are only bound to exercise reasonable care in the construction and maintenance of the same and that therefore the instructions in question did not correctly state appellant's duty under the law.

The portion of the instruction of which complaint is made is in the next language of the Statute prescribing appellant's duty. By the constitution of the State of Illinois, the law making power is vested solely in the legislature and a court has no right to vary, modify, alter or abolish a constitutional law when properly enacted by the legislature.

While in a few isolated cases, courts have perhaps inadvertently condemmed instructions given in the language of the Statute, ~~notably People v. Willy, 301 Ill. 207~~, the duty resting upon the court in the matter of the giving of instructions to the jury, is to lay down the law upon this particular question involved as it exists in this State, and it has long been the settled law of this state that "When an instruction is given in the language of the Statute it must be regarded as sufficient, because laying down the law in the words of the law itself ought not to be pronounced to be error." Mt. Olive and Staunton Coal Company vs. Rademaker, 190 Ill. 538; Donk Bros. Coal & Coke Co. v. Peton 192 Ill. 41; Kellyville Coal Co. v.

Stine, 217 Ill. 516; Mertens v. Southern Coal Co. 235 Ill. 540.

It is contended by appellee that the judgment is excessive. Appellee introduced evidence tending to show that the use of appellee's left arm had been permanently impaired by reason of the accident. The assessment of damages is pecularily the province of the jury and in this state of the record we should not be justified in disturbing the finding of the jury.

The judgment is affirmed.

General No. 7472 Agenda No. 42

April Term A. D. 1922

H. K. Parker, Appellee

vs.

Arthur Maton and Anton Berger, Appellants

Appeal from Montgomery.

HEARD, J.

This is an appeal from a judgment for $60 and costs in favor of appellee against appellants in an action of debt on an attachment bond executed by appellant Maton as principal, and appellant Berger as surety in an attachment suit brought by Maton against appellee before a Justice of the Peace. The attachment writ was quashed by the Justice of the Peace and the proceeding terminated in appellee's favor. Appellee then brought this suit upon the attachment bond.

There were three counts in appellee's declaration but the bond was not set out therein in **haec verba** and no copy of the bond was filed with the declaration. Appellants craved oyer of the writing mentioned in the declaration which was granted and the instrument was thereupon read and became a part of the record.

After an amendment had been made and a demurrer had been overruled to the amended declaration appellants filed seven pleas. The first plea was **nil debit.** The second was **non est factum.** The third was a plea of non damnificatus. The fourth and fifth were pleas of performance. The sixth was a plea of set off, alleging that plaintiff was a non resident of the State of Illinois and setting up a claim for unliquidated damages claimed to be due from appellee to Maton. The seventh was also a plea of set off. A demurrer was sustained to the first, third, sixth and seventh pleas. Appellants stood by their pleas to which demurrer had bene sustained and issues were then made up and the cause proceeded to trial with the result aforesaid.

Much space is devoted in appellant's brief and argument

to an alleged variance between the bond offer-

ed and admitted in evidence and the bond described in the declaration. No variance is pointed out between the bond admitted in evidence and the writing which became a part of the pleading after oyer.

The court did not err in admitting the bond in evidence.

It is contended by appellant that the court erred in sustaining the demurrer to appellant's pleas. A plea to be good must raise a direct issue with the facts set up in the declaration or confess and avoid them. In an action of debt upon an attachment bond a plea of **nil debit** does neither and is not a good plea. Mix vs. People 86 Ill. 329. Neither was a plea of **non damnificatus** good in this case. In McClure vs. Erwin 3 Con. 332 it was said. "The plea should go to the right of action and not to the question of damages. The plaintiff, so far as it depends upon the pleadings, shows his right to recover by setting forth the bond with its condition, and alleging a breach of that condition, either general or special, as the case may require. If the defendant by his plea admits that the condition has been broken, he concedes the plaintiff's right to recover, and by not denying the breach assigned, but instead of doing this, interposing the general plea of non damnificatus, he, in effect, admits the breach." It has been so frequently held that unliquidated damages cannot be set off in an action of this kind that no citation of authorties is necessary. The court did not err in sustaining the demurrer to the pleas in question.

It is claimed by appellants that the damages allowed appellee were excessive. There is evidence in the record which amply sustained the judgment if credit were given it by the Jury. The Jury having given credence to such evidence we would not be justified in disturbing their finding.

Finding no reversible error in the record, the judgment is affirmed.

Opinion filed Oct 25, 1922
Cause transferred to Supreme Court

General No. 7488 Agenda No. 5

October Term, A. D. 1922

A. J. Brown, et al, Appellants

vs.

H. L. Fouts, Co., Treas., et al., Appellees

Appeal from Circuit Court Fulton County, Illinois.

HEARD, J.

227 I.A. 627

Appellants filed their bill in chancery in the Circuit Court of Fulton County, setting up the pretended organization of Community High School District No. 281 in the counties of Fulton, Schuyler and McDonough; that certain appellees were holding and executing without any authority of law the pretended offices of members of the Board of Education of said district; that the said pretended members of the Board of Education of the said Community High School District No. 281 attempted as such Board to make a levy of taxes for and on behalf of said supposed Community High School District No. 281, and filed their certificates of levy with the respective County Clerks of the Counties of Fulton, McDonough and Schuyler aforesaid against the respective properties of these complainants in said Counties within the territory of the said supposed Community High School District; and which said clerks have extended said levies against the properties of complainants upon the tax books of said Counties; that complainants have refused to pay said taxes levied and assessed as aforesaid, on behalf of said District No. 281, for the reason that said Community High School District was never legally organized and that there were no persons legally authorized to make such levies; that the respective County Collectors of said Counties are now endeavoring to enforce the collection of said taxes from complainants, respectively, and have made applications to the respective County Courts of said Counties for judgments, as provided by law for the collection of unpaid taxes, and costs and interests; that complainants have in said courts filed

their objections to said applications for judgments for said Communtiy High School taxes, giving reasons for said objections that said Community High School District was never legally organized, and that there was no one legally authorized to levy said Community High School tax;

that the said respective County Courts hold that said objections are ineffectual to stay the collections of said taxes, and that said Courts can not undertake to investigate the validity of the authority of said Board of Education to levy such taxes;

that the said respective County Collectors of said Counties are now threatening to sell the lands of complainants to enforce the collection of said taxes, and will begin such sales on June 12, 1922, in pursuance of advertisements published by them for such purposes, unless restrained by the Court; that quo warranto proceedings are now pending in the Circuit Court of Fulton County to test the validity of the organization of said district;

The prayer of the bill was that H. L. Fouts, County Treasurer and County Collector of Fulton County, James A. Barclay, County Treasurer and County Collector of McDonough County, Illinois, C. W. Worthington, County Treasurer and County Collector of Schuyler County, Illinois, and the Board of Education of Community High School District No. 281, in the Counties of Fulton, McDonough and Schuyler, Illinois, P. R. Johnston, F. O. Holmberg, Marion Young, Elmer Onion and L. K. McFadden, members of the Board of Education of Community High School District No. 281 in the Counties of Fulton, McDonough and Schuyler, Illinois, their attorneys, solicitors, agents and servants, and each of them, may be restrained by an order and injunction of the Court from collecting or attempting to collect or from proceeding in any manner to enforce the collection or payments of the said taxes for said Community High School District No. 281 in the said Counties of Fulton, McDonough and Schuyler until the further order of the Court,

and that said tax for the said Community High School District No. 281 may be held and declared to be illegal and levied and assessed without authority of law and of no force and effect, and that said complainants may have such other and further relief in the premises as equity may require, etc.

A temporary injunction was granted by the Master in Chancery. A motion was filed by appellees to dissolve the injunction for want of equity upon the face of the bill. This motion coming on to be heard by the Court the injunction was dissolved and the bill dismissed for want of equity at appellant's costs, by decree of the Court from which decree an appeal was taken to this Court.

In People vs. Holton, 298 Ill. 225 the rule is laid down that "The question of revenue is involved when some recognized authority of the state or some municipality authorized by law to assess and collect taxes is attempting to proceed, under law, to collect the same, and questions arise between it and those of whom taxes are demanded."

In Sec. 118, Chap. 110, Smith's Rev. State of Ill., it is provided that appeals from Circuit Courts in all cases relating to revenue shall be taken directly to the Supreme Court. This case being one relating to revenue, the appeal should have been taken to the Supreme Court instead of this Court, and the cause is ordered transferred to the Supreme Court.